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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 471

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,

Petitioners,

VS.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

MEYER ABRAMS,
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THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioners A. B. Gochenour, Meyer Abrams, Harry J. Myerson and Fannie B. Stern, Executrix of the Estate of Joseph L. Stern, deceased, the Appellants in the above entitled cause, petition this court for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit,

which affirmed the order of the District Court of the United States, allowing $65,000.00 as fees to the Appointees of the Court and nothing to the petitioners representing creditors, to the end that the judgment be reversed with directions to reduce the fees of the Appointees of the Court and to allow reasonable compensation to the petitioners.

STATEMENT OF THE MATTER INVOLVED.

This Petition seeks to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the order of the District Judge, who allowed $65,000.00 in fees to his Appointees, the respondents herein, and nothing to the petitioners, counsel for certain creditors, who were primarily responsible for the prosecution of the action which resulted in the recovery of $550,000.00 for the benefit of the bankrupt estate.

Petitioners sought an allowance for services rendered from August, 1939, to May 1, 1941, when Respondents were appointed as attorneys for the debtor to institute the proceedings whereby the recovery was made as a result of a compromise. While Respondents were appointed on May 1, 1941, they also sought and were allowed compensation from November 22, 1938, to May 1, 1941, prior to their appointment.

The Court of Appeals held that no matter how beneficial Petitioners' services were, they were entitled to nothing, because of their failure to obtain an order from the Court to perform their services. At the same time it affirmed the allowance to the Respondents for their alleged services prior to their appointment. The services of the Petitioners and Respondents were performed while the debtor, Cleveland Terminal Building Company was

undergoing reorganization under Section 77B, in the District Court of Cleveland, Ohio.*

Petitioners, according to the opinion (R. 104), made a comprehensive study of the facts conceived and developed the legal theories which formed the basis for the recovery of the $550,000.00. They instituted a suit in Cleveland, in the name of "Howe" and another suit in the name of "Gochenour" in Indiana, to recover the fund. The Indiana suit was dismissed on the ground that "creditors" had no right to bring the action due to the fact that the "debtor" was administered by the District Court in the reorganization proceedings. While the other action was still pending at Cleveland, Petitioners applied to the District Court to permit them to sue in the name of the debtor and for other relief. After the denial of the application, they appealed to the Sixth Circuit which reversed the decision below with directions to appoint an examiner to investigate the charges contained in the two suits and, if the charges were well founded, that the debtor should proceed with the suit, or upon its refusal, that Petitioners be given the right to maintain the action in its name (*Gochenour* v. *The Cleveland Terminals Building Company*, 118 F. (2) 89).

Thereafter on May 1, 1941, Respondents were appointed as counsel for the debtor on their own application on an *ex parte* order and they instituted the suit in Indiana which brought the $550,000.00 fund, as a result of a compromise. They filed a petition for compensation asking for $75,000.00 (R-1-19), scheduling 1600 hours, one-third of which was for alleged services performed from November 28, 1938, to May 1, 1941, prior to their appointment (R-17-19). Petitioners filed a petition asking for an allowance of $25,000.00 (R-19-24). Their application for

* The Debtor was in possession in lieu of a Trustee and because of the adverse interest of its officers and directors, the Court appointed Respondents, Fogg and Leckie, as Supervisors, and he appointed the Respondent, I. Walter Sharp, to represent the Debtor as to some of the phases of the reorganization.

services up to the appointment of the Respondents, covered 870 hours (R-19-24).

The hearing was had before a Master who recommended an allowance of $65,000.00 to the Appointees of the Court and "nothing" to the Petitioners. He based his recommendation on the ground that the services of the Petitioners were not beneficial to the estate and that the fund was recovered solely as a result of the services performed by the Respondents and also on the ground that Petitioners were volunteers. He did not apply this to the appointees of the Court for the services rendered prior to their appointment, while they served as volunteers.

The District Judge did not overrule the objections to the Master's report on the ground that Petitioners were volunteers, but on his conclusion that his appointees were entitled to all of the credit.

The Court of Appeals held that Petitioners did perform beneficial services in conceiving and developing the cause of action and in supplying the facts which brought about the prosecution of the Cause of Action. It held however, that no matter how beneficial their services might have been, they were entitled to "nothing" because of non-compliance with General Order 44.

THE QUESTIONS PRESENTED.

The following questions are presented by this petition:

1. Whether Rule 52 which the Court of Appeals invoked to sustain the allowance of $65,000.00 to the Appointees of the court was applicable in the instant case, in the absence of any foundation for the findings.

2. Whether it was proper to ignore the application of General Order 44 against the Appointees of the Court who represented the "debtor" for services claimed to have been rendered prior to their appointment and to apply it against the Petitioners who represented "creditors".

3. Whether the Appointees of the Court were entitled to the $65,000.00 for alleged 1600 hours of services when 400 of these hours were consumed prior to their appointment, and where they were not appointed on a contingent basis, and there was no showing why it was necessary to employ three sets of lawyers besides the attorney who filed the suit in Indiana.

4. May a District Judge overrule objections to a Master's report which lacked essential basic findings without making findings of his own and sustain the report on conclusions which are different from the Master's conclusion, and may his order be affirmed by a reviewing court which was neither in accord with District Judge nor with the Master on the factual issue, by reason of alleged non-compliance with General Order 44, when the point was not even raised and when it is clearly inapplicable?

5. May a Judge overrule objections to a Master's report without passing on the objections to the admissibility of evidence and enter judgment based on such evidence, and was it proper for a court of review to base its opinion on such evidence, without even discussing or ruling on the competency of the evidence, when the authorities on their incompetency were not even disputed by the Respondents?

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals applied General Order 44 in Bankruptcy contrary to Section 242 and 243 of the Bankruptcy Act. Its erroneous construction of the order and its application to reorganization proceeding under Chapter X calls for the exercise of the discretionary powers of this Court to review its decision by the issuance of the writ in order to settle important Federal questions of procedure and to harmonize this Order with the statutory provision.

2. The application of Rule 52 to a case where the foundation for the findings is completely lacking is in direct conflict with the decisions of other circuits and with the latest decisions of this Court, and the writ should be issued to harmonize the decisions.

3. The allowance of $65,000.00 to Appointees of a Bankruptcy Court who were not appointed on a contingent basis, without any evidence in the record showing the basis for the allowance, can find no support in the law and involves an important federal question in the administration of Bankruptcy.

4. The application of two different measures of justice, one in favor of the Appointees of the Court without applying General Order No. 44 against them, and the other, against the Petitioners, by invoking General Order No. 44, deserves a review of the case by this Court.

5. The refusal of the Court of Appeals to pass on the admissibility of incompetent evidence by the Master, the affirmance of the order of the District Judge based on such evidence, the resort of the reviewing court to Rule 52 to justify the allowance of $65,000.00 to the Appointees of the Judge and the denial of any compensation to the Petitioners, because of non-compliance with

Order No. 44 which is clearly inapplicable, involve important questions of Federal procedure and administration of justice as to warrant a review of the case by the issuance of a Writ of Certiorari.

PRAYER FOR RELIEF.

Petitioners therefore pray that this court may allow the Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to the end that its judgment affirming the order of the District Court be reversed with directions to reverse the order below and to direct a reduction of the fees of the Respondents and to allow reasonable compensation to the Petitioners.

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BRIEF IN SUPPORT OF PETITION.

JURISDICTION INVOKED.

The Judgment of the Court of Appeals for the Sixth Circuit, affirming the judgment below was entered June 6, 1944. The rehearing was denied July 17, 1944. The Judgment of this Court is invoked on the Judicial Section 240 (a) 28 U. S. C. A. Sec. 347 (a) as amended by the act of Feb. 13, 1925. The mandate was stayed on August 21, 1944, until the final disposition of this Petition.

OPINIONS BELOW.

The opinion of the District Court is not reported and appears in this record on page 94. The opinion of the Court of Appeals appears in the Record on page 102 and was published (142 F. (2) 991).

A STATEMENT OF THE CASE.

A fund of $550,000 was recovered by the compromise of a plenary suit filed by the Cleveland Terminals Building Company (sometimes hereinafter called "Debtor") against George A. Ball and the Ball Foundation (hereinafter designated as "Ball") in the District Court at Indianapolis, Indiana. The action was for profits received in dividends paid by "Midamerica" to Ball (its principal stockholder) which it realized from its purchase of the collateral at the Morgan sale held September 30, 1935, described in the "Howe" and in the "Gochenour" suits, and set forth in *Gouchenour* v. *Cleveland Terminals Building Company* (118 Fed. (2d) 89). There the

District Court was directed to appoint an Examiner to study the causes of action and to instruct the Debtor to institute a plenary action against Ball, or to permit Petitioners to sue in its name.

While Respondents were negotiating with Petitioners on a form of an order they obtained an *ex parte* order on May 1, 1941, to file the suit and they were appointed as Special Counsel (R. 39-40). The suit resulted in the compromise of $550,000 on January 9, 1942 (eight (8) months thereafter), to which Petitioners consented.

Respondents, Leckie, Fogg and Sharp filed an application for an allowance of $75,000 for their compensation and $182.12 for expenses and $3,500 for their local counsel at Indianapolis (R. 1-19). Petitioners filed an application for the reimbursement of $1,160.62 for expenses and the allowance of $25,000 as compensation (R. 19-24). The matter was heard by a Special Master.

Respondent Sharp made a general statement as to their services and referred to the petition and schedule.

Petitioner Abrams testified in support of petitioners' claim (R. 47-53). At the conclusion of this hearing, counsel for the Securities Exchange Commission recommended a maximum allowance to petitioners of $5,000 and their expenses (R. 58).

Petitioner Gochenour,* a creditor, filed objection to the reasonableness of the fees requested by respondent (R. 78-79). The Master rendered his report (R. 64) on April 15, 1943, recommending the allowance of $65,000 to Special Counsel and $3,000 to their local counsel and their expenses, and "nothing" to the petitioners (R. 73).

* Unless otherwise indicated the word petitioners refers to the other petitioners who were the attorneys for Petitioner Gochenour.

Objections were duly filed by Petitioners to the Master's report supported by a brief (R. 74-84). A hearing was had before the Court on October 26, 1943 (R. 88). On November 9, 1943, the court filed a memorandum opinion (R. 94) and on November 13, 1943, entered its order (R. 99) allowing $65,000 to its appointee, $3,000 to their local counsel and "nothing" to petitioners.

The Evidence.

The evidence of Respondents consists of the "statement" of Mr. Sharp (R. 25-33), and the petition and schedule attached thereto. Their services, according to the schedule consumed 1600 hours (R. 33), 400 of which was performed from November 22, 1938, to April 30, 1941, prior to their appointment (R. 7-19). A large part of the services was devoted in opposition to the Howe suit, which was commenced by petitioners to protect the estate and to recover the funds.

The evidence of Petitioners was that of Mr. Abrams (R. 47-56). His testimony tended to show that the $550,000 recovery resulted from his efforts and study of the Senate Investigation Committee records and files in Washington, D. C., when these records were not yet known or available to the public. This was the basis for his objections to the claims of "Midamerica" which were made available to all parties, pursuant to the Master's request, when he prepared Exhibit "H" which was filed October 14, 1937. This Exhibit (R. 60-64) disclosed the facts concerning the sale of the collateral to "Midamerica" and the arrangements to buy the collateral for the fiduciaries, the Van Sweringens. The existence of the cause of action did not occur to him when he filed the objections to the claims of "Midamerica", and he conceived the existence of such action, in the middle of August, 1939.

Petitioners filed the "Howe" suit on September 11, 1939, and sought leave to join the Debtor as party thereto. The Debtor stated that it did not think any recovery could be had but if the creditors wanted to pursue their remedy it had no objection, provided it be made a nominal party only (R. 49-50). Thereafter Petitioners filed the action against Ball. Both suits were the subject of the appeal which resulted in the reversal of a part of the order on March 3, 1941, with directions to the District Court to consider the suits as petitions to instruct the Subsidiary-Debtor to sue or to permit petitioners to sue in its name (118 F. (2) 89). While negotiations were pending for the entry of the order on the mandate, and, without any notice (R. 51), Respondents, Leckie, Fogg and Sharp obtained their appointment as Special Counsel.

The appointees of the Court filed in the name of the Debtor 31 exhibits (R. 39-47) in their efforts to oppose the compensation of Petitioners, including newspaper clippings (Ex. 9) which were received over objections.

The Master's Report.

In passing on the petition of respondents, the appointees of the court, the Master confined his report to two pages (R. 65-66). He found : (1) that the asset recovered was not an "apparent" or "known asset" and it was developed by the applicants from a more or less doubtful inchoateness to a cash recovery of $550,000; (2) that by "careful" and "progressive" methods, the "first concrete step" was the "successful attack" by the applicants "upon claims" filed by Midamerica; (3) that with the "first step successful" a strong foundation was laid for the basis of the recovery from Ball; (4) that with the exception of a few dates subsequent to May 27, 1940, Special Counsel have performed services "directly" in connection with the recovery of this asset, and (5) that

it appears "superfluous" to state that services rendered in the successful recovery of assets should not be compensated as routine or administrative services and that $65,000 was therefore fair and proper.

The Master's report on petitioners' application takes up seven typewritten pages (R. 67-72). The Master found: (1) that the testimony of petitioner Abrams that the idea of the cause of action was conceived by him was untrue; (2) that the statement in the petition that petitioners ascertained that it was not the desire of the Debtor or other creditors to spend money for the prosecution of the suit and that petitioners for the purpose of protecting the asset, filed the complaint in Indiana, is untrue; (3) that petitioners dismissed the Howe suit, and therefore, the Howe suit was unproductive and petitioners were not entitled to compensation (R. 67-69).

The Master further found: (4) that petitioners based their claim for compensation on the reversal of the order of the District Court in 118 F. (2d) 89, but the record does not bear out this statement; (5) that Debtor's Exhibits 19 and 20 conclusively show that at the time when Abrams appeared before the Court of Appeals that the Judge had theretofore looked into the various matters and things alleged as to the officers and directors of Debtor and had "made findings" or had "taken action" with regard to them;* (6) that when Abrams testified that he conceived the cause of action against Ball because of the investigation that he made he, the Master, suggested that he also had been receiving reports from the Senate Committee, and Abrams answered that he had examined the

* It is evident that the ire of the Master was aroused by the criticism of his report in the opinion which reversed the order of the court confirming his report on the ground of abuse of discretion, and he, therefore, attempted to justify his report and the acts of the judge by the assertion that the judge had heretofore looked into the various matters, which is not supported by the exhibits to which he referred.

Master's files and found no such reports. Only after the Master, in order to protect the record, made a statement as to his receipt of the reports did the witness "retire to the position that it was probably the results of his correspondence with Senator Wheeler that a person came to see "the Master" (R. 70-72). The Master commented (R. 72) on the recommendation of the Securities Exchange Commission which recommended a maximum of $5,000 and disagreed with its recommendation. He concluded that the services did not bring any results; that volunteers cannot receive compensation unless their services were productive. The Master recommended the denial of the expenses and any compensation (R. 73).

The Objections.

The objections to the Master's report (R. 74-84) were: (1) to his recommendation for the denial of any compensation and expenses to Petitioners, and the recommendation to allow $65,000 to the Respondents.

The first objection was to the failure of the Master to find: (a) that the first step leading to the recovery of the fund was the filing of the objections by Petitioners in August, 1937, to the claims of Midamerica, and the filing of Exhibit "H" on October 14, 1937, which disclosed all of the material facts upon which the cause of action was founded; (b) the facts which Petitioners disclosed in the trial against the claim of J. P. Morgan & Company; (c) that Respondents availed themselves of the theories and facts developed by Petitioners which led to the recovery of the $550,000 fund; (d) that the suit against Ball was the direct result of the appeal in which the court rendered its opinion on March 3, 1941; (e) only after the opinion which directed the court to either instruct the Debtor to sue or to permit the Petitioners to

sue in its name was the suit filed; (f) that on April 30, 1941, Petitioners filed their petition in the District Court for the appointment of the Examiner under the mandate of the court and while they were negotiating with Respondents with reference to the form of the order, they appeared on May 1, 1941, without notice, and procured the authority to file the suit and obtained their appointment; (g) that the order on the mandate expressly stated that this part was eliminated from its order because of the previous order which authorized the filing of the suit against Ball; (h) that the suit against Ball did not result from the order which dismissed the application for instructions; (i) the contention that Respondents filed the Ball suit after the final determination by the court of the Midamerica claims is contradicted by the record as the suit was filed before the court disposed of the petition for rehearing; (j) that Petitioners together with Respondents were entitled to one fee for the recovery of the $550,000 to be divided proportionately among them, bearing in mind that Special Counsel were not employed on a contingent basis and that Petitioners performed their services on a contingent basis; (k) the theories and ideas as to the suit against Ball, originated with Petitioners and they produced the cause of action which led to the recovery; and (l) that from the total fees recovered Petitioners were entitled to $25,000 and their expenses (R. 74-77).

The second objection to the Master's report was, that the Master misconceived the facts and erred in his application of the law; that his reasonings are founded on distorted quotations from the petition and the evidence and his report is barren of any findings and was purposely designed to build up the services of the appointees of court and to minimize the services of Petitioners and a

reading of his report and his ruling on the evidence leads to the irresistible conclusion that he was biased (R. 77).

The third objection was to the conclusions of the Master in respect to Respondents' claim for services performed from November 22, 1938 to April 30, 1941, on the ground: (a) that no evidence was offered in support of the schedule; (b) no action was taken by them against Midamerica; the trust doctrine against Midamerica was never advanced by them and their Ball suit was not founded on such theory; (c) after the filing of the Howe suit against Midamerica, Respondents filed an answer on September 27, 1939, which tends to contradict the statement of November 22, 1938; (d) it appears from their schedule that they considered a cause of action against Midamerica on the theory that it was trustee for the Debtor but they never advanced such a theory in any of their pleadings, and (e) the fact that they never sued Midamerica and they did not join in the "Howe" suit refutes their schedule (R. 77).

The fourth objection was (R. 78), to the conclusion that inasmuch as the "Howe" and the "Gochenour" suits were unproductive, Petitioners were not entitled to compensation. This conclusion was irreconcilable with Exhibits 19 and 20 on which it is based. The fifth objection was (R. 78) that the recommendation that the allowance of $65,000 to Leckie, Fogg and Sharp who were appointed on May 1, 1941, and the recommendation to deny any compensation to petitioners was not based on any facts or on any competent evidence. The sixth objection was (R. 78) to the statement that Petitioners did not object to the compensation of Leckie, Fogg and Sharp, and is contradicted by the record of October 30, 1942, and by the written objections which were filed and set out in these objections.

The seventh objection was (R. 79) to the statement that with the exception of a few dates the services of Respondents were "entered directly in connection with the recovery of the assets." This is contradicted by their schedule showing: (a) that they devoted a great deal of time before their appointment to the Howe suit; (b) the recommendation to compensate them for the services in connection with the Howe suit can only be reconciled on the theory that the Howe suit was beneficial; (c) the recommendation to pay $65,000 to Respondents for services rendered prior to their appointment in connection with the actions taken by the Petitioners must be based on the theory that the suits were beneficial to the recovery of the fund; (d) the recommendation to allow them $65,000 in connection with their services concerning the cause of action conceived by Petitioners must lead to the irresistible conclusion that Petitioners' services produced benefits to the estate.

The eighth objection was (R. 80) to the finding that Respondents acted under the orders of the court, which finding is contradicted by the record that they performed services prior to May 1, 1941, without such orders. There is no finding or determination as to the fair and reasonable value of the services prior to their appointment, and subsequent to their appointment.

The ninth objection was (R. 80) to the statement of the Master that the asset was not an "apparent" or "known asset" and was "developed" by Respondents and that this came about by careful and progressive methods, the "first concrete step" being their successful attack upon the claims of Midamerica and with the first step successful a strong foundation was laid for the basis of the recovery from the Ball interests. This is contrary

to the undenied proof showing: (a) that the first step was taken by Petitioners in filing their objections to the claim of Midamerica; (b) that the Master's own order of October 25, 1938, states that Respondents have "substantially" adopted the objections of the Petitioners; (c) that the facts which formed the basis for the claim against Ball were compiled, analyzed and submitted by Petitioners as shown by Exhibit "H" filed of record October 14, 1937; (d) the Master's statement that the pertinent facts were known to him cannot be reconciled with the statemest that the asset recovered was not known or apparent and was developed by Respondents; (e) he failed to consider Exhibit "H" which made all the facts available to all parties.

The tenth objection was (R. 81) that there was no factual finding for the recommendation to allow $65,000 to Respondents and the denial of any compensation to Petitioners. The eleventh objection was (R. 81) to the statement of the Master that it appeared clear from the record that Petitioners had no cause of action against Midamerica and dismissed the action. This statement is based on a distortion of the record and is contradicted by the record. The twelfth objection was (R. 82) to the statement of the Master that Petitioners did not conceive the cause of action but that Respondents conceived it.

The thirteenth objection was (R. 82) to the statement of the Master that because Petitioners filed their suit in Indiana on October 11, 1939, they could not have learned the wishes of the Debtor or the creditors at that date because the meeting before the Master was scheduled for the next day: (a) the creditors filed memorandums objecting to these suits before the meeting; (b) while the creditors stated their position on October 12, 1939, that

they opposed the spending of $25,000 of the estate money in a suit against Ball, there is nothing in the record to refute the testimony that Petitioners received the information as to their position prior to the filing of the Ball suit and the Master had no right to base his conclusions on unfounded assumptions; (c) the petition for instructions which was filed by Respondents made no recommendation that action be taken and it appears therefrom that it was filed to show a superficial effort to protect the estate and it was not filed with any real desire to protect the creditors.

The fourteenth objection was (R. 82) to the statement of the Master that the allegations in the petition that the court reversed the order of the District Court is untrue, which is contradicted by the order of the District Court which was introduced in evidence as Debtor's Exhibit 16. The fifteenth objection was (R. 82) to the statement that the Master, as Examiner, made his examination and report to the effect that no benefit accrued to the estate from the Howe and Gochenour suits and recommended that an order be entered permitting the petitioners to dismiss the Howe suit. This is contradicted by Exhibits 19 and 20 to which he refers. The sixteenth objection was (R. 83) to the statement concerning the testimony of Abrams which showed that the Master was a partisan and not impartial. The seventeenth objection was (R. 83) that it was the duty of the Master to sustain the objections to hearing separately the question of fees from the question of the allocation of the fund. The eighteenth objection (R. 83) was that the Master erred in rendering his report on incompetent evidence, in receiving statements in lieu of evidence. The nineteenth objection was that the report of the Master is contrary to the law and to the evidence and is based on erroneous in-

ferences and deductions. The twentieth objection was that the Special Master improperly received evidence consisting of newspaper clippings and other incompetent evidence, and the twenty-first objection was that it was the duty of the Master to pass upon the fairness and reasonableness of the entire fee for the joint efforts of all attorneys in bringing in the $550,000 fund and to apportion such fees among Petitioners and Respondents (R. 84).

The Ruling of the Judge.

The District Court overruled all objections, allowed $65,000 to its appointees and denied any compensation to Petitioners. Its reasons appear in its memorandum of November 9, 1943 (R. 94-99).

The District Judge did not agree with the Master that Petitioners were not entitled to compensation on the ground of being volunteers (R. 97) but sustained the report because of his statement that their services did not benefit the estate. The Judge gave full credit for the recovery of the funds to his Appointees and justified the allowance of $65,000.00 on the ground (R. 99) that it was only 12% of the amount recovered, although they were not appointed on a contingent basis.

The Opinion of the Court of Appeals.

The Court of Appeals disagreed with the Master and with the Judge on the question whether the cause of action originated from the Petitioners, but on the contrary stated in its opinion (R. 104), that "Abrams made a study of the facts" and "epitomized the evidence" and used the facts as a basis for the objections to the claims (which the Master credited to the Respondents when he stated that they took the first step which led to the re-

covery of the fund). Contrary to the findings of the Master (R. 65) that the first step leading to the recovery was taken by the Appointees of the Court when they filed their objections to the claims and to the statement of the Judge that his Appointees developed all of the facts and theories which lead to the recovery (R. 96-97), the Court of Appeals stated in its opinion (R. 104) that "Abrams prepared a synopsis of the facts" concerning the sale of the collateral, which he gave to all attorneys of record concerning the purchase of Midamerica, which was the basis for the cause of action on which the $550,000.00 was recovered. The Court of Appeals held that no matter what benefits Petitioners contributed to the recovery of the fund, they were not entitled to compensation because of their failure to comply with General Order 44 (R. 109). It approved the allowance of the $65,000.00 to the Appointees of the Court (R. 110) on the ground that under Rule 52, it was required to accept the findings of the Court as correct unless "clearly erroneous." While it held that General Order 44 could not be "by-passed" by Petitioners who represented "creditors" it by-passed the order as to Respondents who claimed to have represented the "debtor in possession" from November 28, 1938, to May 1, 1941, prior to the appointments.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in sustaining the orders overruling the objections to the allowance of $65,000.00 to the appointees of the Court because:

(a) They were appointed May 1, 1941, and it was improper to allow them compensation for alleged services performed prior to their appointment.

(b) Appointees of a Court who are not appointed on a contingent basis may not be allowed compensation on a percentage basis.

(c) There were no basic findings in the Master's Report to justify the compensation, and the Master failed to distinguish between the services performed prior to May 1, 1941, and thereafter.

2. The order allowing the $65,000.00 is not supported by basic findings, and is based on erroneous legal propositions:

(a) In applying the test that its appointees were entitled to compensation on a percentage basis.

(b) In failing to comply with Rule 52(a) when the Master's report lacked basic findings.

(c) In construing its previous order appointing Leckie & Fogg as supervisors to have constituted an appointment to sue Ball.

3. The order allowing $65,000.00 to Respondents is unsupported by any competent evidence, and it was the duty of the Court of Appeals to pass on the admissibility of the evidence.

4. The Court of Appeals erred in not ordering that the objections to the Master's Report be sustained and to find and to hold that the $550,000.00 fund was recovered as a result of the services performed by the Petitioners up to May 1, 1941, and of the services performed by the Respondents thereafter. It was its duty to direct the Trial Judge to reject the Master's Report, to sustain the objections, and to allow fair and reasonable fees to be divided among the Petitioners and the Respondents upon findings as to the value of their respective services.

5. The findings of the Master and the conclusions of the Court that Petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

6. The Court of Appeals erred in not directing the Judge to sustain the objections to the Master's Report that the fund was recovered as a result of the services performed by Petitioners in commencing the Howe and the Gochenour suits leading up to the decision of March 3, 1941, which compelled the filing of the action by Respondents and which brought the recovery of the fund.

7. It was the duty of the District Court to sustain the objection on the ground that the Master was biased, and to make the proper findings the Court of Appeals erred in not reversing the order above.

8. The Master and the court clearly erred when they received in evidence over objections the newspaper clippings being Debtor's Exhibit 9 and the decree is based on the incompetent evidence, and it was the duty of the Court of Appeals to pass on the errors assigned on this point which it failed to do.

9. The Master improperly refused to permit the cross-examination of the witness Sharp, and erred in rejecting competent evidence when he told the witness Sharp not to answer some of the questions. It was the duty of the court to sustain the objections to his report, and it erred in not doing so, and it was the duty of the Court of Appeals to reverse the order.

10. Petitioners also adopt by reference all of their objections which appear in the printed record at pages 74 to 84.

SUMMARY OF ARGUMENT.

I.

It was the duty of the Court of Appeals to reverse the order allowing the $65,000.00 to the respondents and denying any compensation to the petitioners and the affirmance of the order is in conflict with decisions of other Circuits and with the decisions of this Court.

(a) The services of Leckie, Fogg and Sharp prior to May 1, 1941, were voluntarily rendered and no compensation was allowable for such services without compliance with General Order No. 44.

II.

The basic findings for the allowance of the $65,000.00 were absent and the Court of Appeals clearly misapplied Rule 52 when it affirmed the judgment below.

(a) The District Judge had no personal knowledge of the services performed by his Appointees.

(b) The schedule of the services of the appointees of the Court runs counter to the findings and conclusions of the Master and of the District Judge and it was the duty of the Court of Appeals to reverse his order.

(1) There was no showing why it was necessary to have three attorneys.

(2) The facts and the theories were taken from petitioners' complaints.

(c) Appointees of a court whose compensation is not contingent may not be compensated on a percentage basis of the amount recovered and their compensation must be confined to the value of the services rendered, and the finding of the Master which was adopted by the court is based on erroneous legal principles and should have been reversed. The Court of Appeals erred when it applied Rule 52 in the absence of a foundation for the findings.

III.

The recovery of the $550,000 fund was the direct result of the services performed by petitioners in the Howe and Gochenour suits and in the petition for clarification which was permitted to stand as a petition for instructions on the debtor to either sue or to permit petitioners to sue in its name.

(a) The recovery of the fund resulted from petitioners' efforts.

(b) The record contradicts the statement of the judge.

(c) The rights of the creditors were protected by the petitioners.

(d) The record does not support the timing of the suit by the Judge.

(e) The first step to recover the fund was taken by petitioners.

(f) Petitioners made all facts available to respondents.

IV.

The findings of the Master and the conclusions of the court that petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

(a) Respondents' evidence showed that they made use of the facts and theories which petitioners made available to them.

(b) The Howe suit in Ohio and the Gochenour suit in Indiana and the appeal resulting in the mandate to appoint an examiner to investigate the causes of action and to direct the subsidiary-debtor to either commence an action in its name or to permit petitioners to proceed with the action in its name resulted in the recovery of the fund and petitioners were entitled to reasonable compensation.

V.

The allowance of compensation for the recovery of funds is governed by rules of equity and is not confined to statutory provisions.

VI.

General Order 44 in bankruptcy was improperly invoked against petitioners who did not claim to represent a trustee, a receiver or a debtor, but represented creditors.

(a) Petitioners performed their services in connection with the reorganization plans and no order was required for such purposes.

(b) No order is necessary when the interest of the trustee is adverse to the interest of the creditors.

VII.

The Court of Appeals failed to examine the foundation for the findings on which it affirmed the order below.

ARGUMENT.

I.

It was the duty of the Court of Appeals to reverse the order allowing the $65,000.00 to the respondents and denying any compensation to the petitioners and the affirmance of the order is in conflict with decisions of other Circuits and with the decisions of this Court.

The District Judge appointed respondents Leckie, Fogg and Sharp as Special Counsel on the day when it entered the *ex parte* order authorizing them to sue Ball on May 1, 1941 (R. 39-40). They were *not "appointees" of the court* as to such action *prior* to that day. Their schedule of services contains over 400 hours for *alleged* services from November 22, 1938, to April 30, 1941, *prior to their appointment* (R. 7-19).

(a) The services of Leckie, Fogg and Sharp prior to May 1, 1941, were voluntarily rendered and no compensation was allowable for such services without compliance with General Order No. 44.

The Seventh objection was (R. 79) to the finding of the Master that the services of respondents were performed "directly in connection with the recovery of this asset", and that such finding was *contradicted* by *their* schedule. The schedule shows (R. 7) that on November 22, 1938, Leckie and Fogg held a "conference" with *themselves* because of the Master's action on the *claims* of Midamerica. Their conference allegedly held with reference to the theory that "Midamerica" acted as "trustee" and on the question whether the Debtor should file suit against

Midamerica. *Neither Leckie nor Fogg had anything to do with claims against Midamerica.*

The order of February 8, 1938, appointing them as "supervisors," on which they relied in the petition (R. 1), expressly provided (R. 6)

> "that said Frederick L. Leckie and Joseph G. Fogg *shall have no duty to exercise any supervision and control over the action the Subsidiary-Debtor may take with respect to claims* now pending in this proceeding or with respect to any plan of reorganization herein."

and they were only authorized to:

> "supervise and direct the *management* of the properties and the operation of the business of the Subsidiary-Debtor as the same shall be conducted by its officers, employees and agents and *to perform such legal services* as may be proper or necessary *in connection therewith.*"

It is clearly obvious from the foregoing that *no authority was granted to them under such order* concerning claims or any action against Midamerica or Ball.

The statement in the opinion (R. 109) that Order 44 "cannot be by-passed" was by-passed by the Judge (R. 96) when he allowed compensation to his subsequent Appointees for alleged services prior to their appointment in the absence of any petition, and order as required by General Order 44.

The Judge stated in his opinion that Fogg and Leckie were his "appointees" as to the Ball suit when they were appointed "supervisors" (R. 98).* The order appointing them as "supervisors" (R. 6) *expressly relieved them from any duty* and responsibility concerning claims of Midamerica and their duties were *circumscribed to supervision of management.* This order is *irreconcilable* with

* Respondents could not have received their appointment to prosecute a cause of action in February, 1938, when, according to their own schedule, the cause of action was first conceived by them in November, 1938.

his opinion. It is irreconcilable with general order 44, which provides:

> "No attorney for * * * Trustee or Debtor in possession shall be appointed, except upon order of the court"

and that no such order shall be entered unless:

> "Upon the verified petition of the * * * debtor in possession"

stating the name of the counsel, *the reason for his selection,* the professional services he is to render, *the necessity for employing counsel* and his connection with any of the parties of interest. This rule was directed against "potential" *evils* as much as against "actual" ones, and the courts are inclined to seize even upon *minor defects* to disallow compensation (*Matter of Shattea,* 51 F. (2) 984; *Jones and Newberry* v. *General Motor Accessories Co.,* 284 U. S. 682).

In the instant case *there was no such petition* filed at any time. Even when the court appointed "Special Counsel" on May 1, 1941, it was not in compliance with this rule, but prior thereto *there was not even an appointment* and the statement of the court that in appointing Leckie and Fogg as "supervisors", it thereby appointed them as special counsel concerning the suit against Ball is contrary to its *own order,* which *limited* the appointment to the "supervision" of the "management".*

Even if respondents had received *ex parte* oral statements from the Judge concerning their future employment, it would not have been a lawful substitute for the prescribed prerequisites under general order 44 (2 Collier on Bankruptcy, 14th Ed., p. 1672). The Court of Appeals completely overlooked the General Order in Bankruptcy

* Petitioner, Gochenour, a creditor of the estate, moved for the appointment of a Trustee for the Debtor because of the adverse interest of its officers and directors, who are also officers and directors of the "Parent". The Court did not appoint a Trustee for the Debtor but appointed Fogg and Leckie as Trustees of the "Parent" and as "supervisors" of the subsidiary, the Debtor.

in passing on the allowance of the respondents while it relied on the order in approving the denial of petitioners' claim to which it was not applicable (*Re Stratton,* 51 F. Supp. 944).

II.

The basic findings for the allowance of the $65,000.00 were absent and the Court of Appeals clearly misapplied Rule 52 when it affirmed the judgment below.

The Judge said in his opinion (R. 99) that this case was not like the ordinary bankruptcy case where the judge seldom has knowledge of the legal services performed, and that he, the Judge, had personal knowledge of the character of the services and of the problems involved.

(a) The District Judge had no personal knowledge of the services performed by his Appointees.

The services concerning the recovery of the fund were *not* performed before the Judge. They were performed *outside* of the court. In the ordinary case the officers of a court in administering the estate perform their services before the judge and he, therefore, is deemed to have personal knowledge. Here, the work consisted of assembling facts, developing theories and embracing them in a complaint which was filed in a *foreign* court. That the services were *not* performed before the judge but were performed in "conferences" between the three *sets* of attorneys, appears from their schedule (R. 7-19). On the most insignificant issues in the case, the Judge abdicated his functions and referred everything to the Special Master. The issue whether to make the debtor a party to the Howe suit which required merely a determination on the pleading, he referred to the Special Master. The issue whether to instruct the debtor to bring the

action, he referred to the Special Master. The issue whether *to set aside his own order* denying leave to make the debtor a party, he referred to the Special Master. All he knew was from the reports which the Master filed containing the schedules.

(b) The schedule of the services of the appointees of the Court runs counter to the findings and conclusions of the Master and of the District Judge and it was the duty of the Court of Appeals to reverse his order.

The schedule of the respondents speaks for itself and is the best evidence against the allowance of the fees. It shows "conferences" between *three* different firms of lawyers, without any explanation why the conferences were necessary, and there was no evidence to explain why one lawyer could not have performed all of the alleged work. From the date of the first alleged conference of November 22, 1938 to August 23, 1939, *nothing was done by them* (R. 7). *Everything was at a standstill.*

On September 11, 1939, petitioners filed the Howe suit against Midamerica and its officers. They served notice on Leckie, Fogg and Sharp that on September 12, 1939, they would apply to the District Court for leave to join the Subsidiary-Debtor as a party. *They indeed became busy from then on according to their schedule.* On that very day when the entire cause of action was completely set forth in the Howe complaint, their schedule sets forth (R. 8) that they held another "research" conference of "6½ hours" on the question "whether to file suit" not only against Ball but *also against Midamerica,* the corporation which they had previously determined *had no assets* and against which they later stated that there was *no opportunity for a recovery.*

This schedule may be responsible for the statement in the opinion (R. 104) that respondents filed a petition for

instructions whether to sue Midamerica, and (R. 105) that the Master reported that respondents "wished to postpone action on the claim against Midamerica". *No such petition was ever presented by them and no such report was ever given by the Master.* It is evident from the opinion that the court *confused* the actions taken against Midamerica by the petitioners with the petition for instruction which respondents filed against Ball. The petition for rehearing pointed out the factual errors (R. 112), but the Court of Appeals denied it without even correcting its opinion on the matters which were contrary to the record.

On September 13, 1939, "8½ hours" were alleged to have been devoted in a "conference" with Kellogg and Sharp who appeared for the *first* time, and the question "whether the Subsidiary-Debtor should file suit against Midamerica" was again discussed and what action should be taken in the Howe suit was also discussed. It was then known to them that Midamerica had no assets as they claimed to have spent many hours on such "researches" previously. *They filed no suit against Midamerica and they acted as volunteers and produced no results.* The time spent on the Howe suit resulted in their answer which they filed on September 27, 1939. This answer consisted of about one printed page and what "researches" were necessary to file such an answer does not appear of record. A cursory examination thereof by the court is invited (R. 49).

The schedule also states (R. 8) that additional "5½ hours" were spent on the *same day* and on September 15, 1939, there was a "conference" *for* 15 *hours on the Howe suit.* A further conference of 8½ *hours* was held on September 16, 1939, on the application for instructions and 5 *additional hours* were consumed when they "dic-

tated" and "revised" the application for instructions. On the *same day* a further "conference" of 9 *hours* concerning the same subject matter is scheduled (R. 9). Another "15-hour" conference was held (R. 9) on September 19, 1939 (on the Howe suit), and an *additional* conference on the same day of 2½ hours relating to the Ball suit. A 9-hour conference was held September 20, 1939, concerning the motion in the Howe suit for leave to make the Debtor a party. A conference of 13½ hours was held on September 21, 1939, on the same subject matter and an additional hour for "research" (R. 9). A "conference" of 6 hours was held September 22, 1939, and another "conference" of 5½ hours is scheduled on September 23, 1939 (R. 10). A conference of 8 hours was held on September 25, 1939, and a further conference of 5¾ hours on the same day. A further conference of 11½ hours was held on September 26, 1939 (R. 10). All of these conferences between themselves related to the same subject matter, the Howe suit—and the alleged "research" concerning the Ball suit.

From all these conferences and researches "*the mountain produced the mouse*", the answer which they filed September 27, 1939 (R. 49), which stated that Subsidiary-Debtor had considered with its counsel the alleged cause of action against Midamerica and was of the opinion that it does not appear to offer sufficient prospect of recovery to justify it incurring any expense; but if the creditors desired to prosecute the suit at their own responsibility it had no objection to being joined as a nominal party, provided no relief is asked against it and no expenses taxed against it.

Not a word is to be found in the answer that they had made any research whether to start a suit, as to the re-

sults of the investigation, and that they considered filing a suit against Ball in Indiana.

Having filed this answer they held another "conference" on September 28, 1939, for 3 hours (R. 10) on the application for instructions and spent an additional 7 hours on September 29, 1939 to "complete" the application for instructions, on which they previously scheduled 13½ hours to a conference where they "dictated" and revised the application (R. 8). They held a further conference of 4 hours on September 30, 1939, concerning such application. The dictation, the revision and the completion of the three-page application consumed 27½ hours. All of this time was spent in preparing an application for instructions which consists of less than three printed pages (Exh. "A", pp. 40-43)*, when all of these facts were set forth in the Howe suit. In their application they stated the suit against Ball "would probably require" that it be instituted in the State of Indiana and that it "entailed practical difficulties of proof" and would involve "the expenditure of a considerable amount of money for expense of litigation". The "search" should have disclosed to them that the proof was simple. Exhibit "H" (R. 60-64), which was filed with the Master on October 14, 1937, contained all of the facts, together with a reference to the exhibits as proofs. *This exhibit was seen by other parties* who took the trouble to examine the Master's file (R. 91).

The *three-page* application for instructions was not filed according to their schedule until an additional 4½ hours were spent on October 2, 1939, in further conferences. The drafting of the order of reference, consisting of a few lines, took them 3¼ hours and the "study" of the Special Master's order, setting the case for a hearing (R.

* This Exhibit was omitted from the printed record by the order of the court.

11) together with other schedule conferences, *took 7 hours.* An additional 7 hours is scheduled for "attendance" at the hearing on October 12, 1939, and "conferences". Further "conferences" were scheduled (R. 12) on October 13 and 16, 1939, for 2¼ hours. Additional "researches" and "conferences" appear in the schedule (R. 12-13) on October 17, 18, 19, 20, 21, 23, 24, 25, 26, 30, and 31, 1939, for 5 hours, 3¾ hours, 7½ hours, 6 hours, 3¾ hours, 8 hours, 7 hours, 2¾ hours, 5 hours, ¾ of an hour and 1 hour, *involving the same subject matter,* and 1¼ hour was devoted on November 2, 1939, to a "study" of the petition filed by Meyer Abrams in Indiana against Ball to which the Debtor was not even a party.

On February 20, 1940, (R. 14), they "studied" the opinion of Judge Baltzell in the Gochenour suit for 1¼ hours and examined on April 2, 1940, the Master's report recommending the dismissal of the application for instructions. They spent 1¾ hours in preparing the order of dismissal on May 23, 1940; ½ hour *for obtaining the approval of Mr. Kellogg to such order on May* 24, 1940. 3 hours were spent with the deputy clerk concerning the order of dismissal on May 27, 1940. Further "conferences" were scheduled (R. 14-15) on October 9, 22, November 4, 8, 9, 11, 25, December 3, 6, 10, 17, 18, and 23, 1940, relating to the Ball suits *after the dismissal of their petition for instructions.*

From January 8, 1941, to April 30, 1941, after their application *had been dismissed,* and there was *no order retaining them as counsel or authorizing them to do anything as to Ball* they again held conferences (R. 15-19) on January 8, 14, 15, 23, 24, 27, 28, 29, February 1, 3, 4, 14, 27, 28, March 6, 28, April 11, 14, 15, 16, 18, 22, 23, 24, 25, 26, 28, 29 and 30, 1941. The subject matter of these

conferences related to "possible settlements" of the Ball suit when they had *no suit on file,* when their petition for instructions *had been dismissed.** This even included a "conference" for the entry of the order *on the mandate of the court* reversing the decision below in the Howe suit and the time spent to obtain *their own* appointment as Special Counsel.

(1) There was no showing why it was necessary to have three attorneys.

No evidence was offered by them as to why it was necessary for three firms of lawyers to participate in the conferences, why it was necessary to have so many conferences, why it was necessary to duplicate these "researches." All that the Master and the Court had before them were the *blank schedules.* The rule as to the "burden" and the necessity to "clearly point out a substantially definite accomplishment," which the Master invoked against the Petitioners (R. 72), was not applied against the "appointees" of the court. *They acted then without authority, without any appointment.* The burden to show that they were appointed in compliance with General Order 44 was on them. They also failed to meet the burden to show why it was necessary for the multiplication of the legal talent (*Woods* v. *City Nat. Bank,* 312 U. S. 262).

All of their work which appears in their schedule from November 22, 1938, to April 30, 1941, led to no results, did not in any way benefit the estate and there is, therefore, no theory of law on which they may be compensated for such service.

If it be true, as the Master stated in considering the application of the Petitioners that the Howe and Gochenour suits were of no benefit to the Estate, then all of the time which Leckie, Fogg and Sharp devoted to the Howe

* There is nothing in the record to explain why Ball should have conferred with the appointees of the court prior to their appointment on a settlement of a claim, when no such suit was even pending, except the suit commenced by the petitioners.

and Gochenour suits produced no results and they as "volunteers" cannot recover anything for their services, according to the rule applied by the Master against Petitioners (R. 72) that "Volunteers of unauthorized and useless services cannot be rewarded," and adopted by the Court of Appeals.

(2) The facts and the theories were taken from petitioners' complaints.

In order to justify their fees, respondents testified that the theories which Petitioners advanced as a basis for the recovery against Ball are completely different from the theory upon which they obtained the recovery. Their main contention is that Petitioners' theory was based on "fraud" and "conspiracy" while theirs was based on a "violation of the fiduciary duty" or a "constructive trust". The Judge sustained the contention (R. 97). The Exhibits speak for themselves and tend to refute the contention.

The complaint in the Howe case (Exhibit "A"; p. 25)* alleged (par. 11, p. 30) that "notwithstanding the *fiduciary* relationship of the individual defendants and their associates, as officers and directors of the said Cleveland Terminals Building Company, and in total *disregard of their* duties toward plaintiff and all creditors * * * and notwithstanding the knowledge on the part of the said Midamerica corporation of the insolvency" of the subsidiary debtor and of the "*relationship, obligations, and duties of the directors*" of the subsidiary debtor, no notice was given of the scheduled sale and that they acquired the available property for themselves, and by reason thereof they were liable "for all profits which accrued as a result of the purchase of the said collateral in the manner aforesaid." In appellants' suit against Ball

* This Exhibit was omitted from the printed record. It appears in the record in Case 872, 313 U. S. 566.

(Exh. "B"; p. 1)*, it was specifically stated that the action was brought (p. 2) "on behalf of all of the creditors of the said Terminal Company *as a class.*" It was alleged (par. 6) that because of the insolvency of the corporation in August 1935, they, the officers, "*became trustees for the benefit of the general creditors*" and "it became their duty to exert every effort for the benefit of the general creditors and to notify them of the true conditions so that they might protect their interests, yet *in violation of their duty* and for the purpose of defrauding the creditors and benefiting themselves," they conspired with Ball and others to acquire the collateral at a "grossly inadequate consideration." It was also alleged (par. 10) that by reason that the directors and officers "*became trustees for the property*" and due to the fact that Ball acquired the property with notice of such facts, and (p. 7) by reason of the fact that Midamerica distributed the profits to Ball, the assets were "*charged and impressed with a trust*" and "Ball" should be required to account to the trust estate. It is apparent from the foregoing that the contention that the suits commenced by petitioners were on a different theory, is without any basis whatsoever.

The contention that Petitioners' suit was based upon "conspiracy" and that their suit was *not based on conspiracy* is refuted by *their own complaint* which used the term "*confederated*" (Ex. "7", Par. 12).

In opposing the motion to dismiss their suit in Indianapolis, Respondents urged (Exh. 7, p. 3) that the Indiana defendants "participated" in a "scheme" in which the Van Sweringens "*were active participants and confederates*" and "the entire cycle of these transactions became *tainted* with violations of trust duties" and im-

* This is the printed record in Case 872, 313 U. S. 566.

pressed "a trust upon said assets", which are the very allegations of the "Howe and Gochenour suits".

Special Counsel charged in paragraph 11 of their complaint the "device" and "scheme" for the "sale" and "purchase" by the fiduciaries for their own "benefit" to the "detriment" of the creditors.

The *hairline* distinction that they make between a suit *for the violation of trust* or breach of duty, and a suit *founded on fraud on the beneficiaries,* and the labeling of the offense is not the important part. *Fraud is an essential element of a "constructive trust" and in the absence of fraud there can be no constructive trust* (*New Mexico Potash C. & Co.* v. *Independent Potash C. & Co.,* 115 F. (2) 544, 547); *Re*: *Mountain State Power Co.,* 118 F. (2) 405, 407; *Strates* v. *Dimotsis,* 110 F. (2) 374, 376. Anyone reading the Howe and the Gochenour complaints (Ex. "B", pp. 1-8, 19-24), and comparing them with the complaint of Special Counsel (Ex. "7")* can come to no other conclusion than that the complaints as pleaded by petitioners were all-inclusive, and it was not necessary to spend the time in the "conferences", "researches" and in drafting, re-drafting, dictating and re-dictating, as is set forth in the schedule for which compensation was allowed (R. 7-19).

(c) Appointees of a court whose compensation is not contingent may not be compensated on a percentage basis of the amount recovered and their compensation must be confined to the value of the services rendered, and the finding of the Master which was adopted by the court is based on erroneous legal principles and should have been reversed. The Court of Appeals erred when it applied Rule 52 in the absence of a foundation for the findings.

The Judge justified the allowance of the $65,000 on the ground that it was "not quite 12% of the amount of the

* Omitted from printed record by order of the Court.

settlement" (R. 99). This was not a proper test to "appointees of the court" who were *not appointed on a contingent basis* and they were entitled to their compensation whether they succeeded or not.

The case was not tried but was compromised on the pleadings. The work was not difficult because the facts, the evidence, and the entire cause of action was pleaded in the Howe and Gochenour suits. It was clearly set forth in the facts which the petitioners prepared and submitted to all attorneys of record as found by the Court of Appeals (R. 104), contrary to the conclusion of the Judge (R. 96-97). It is *conceded* by the opinion (R. 105) that all of the legal principles and factual matters were disposed of and settled in the two appeals (118 F. (2) 89; 119 F. (2) 231) which was *prior* to the order of May 1, 1941, appointing the respondents as counsel.

In denying any compensation to petitioners, the Judge emphasized the fact (R. 94) that they had previously filed a petition for $172,200.00 and were allowed $18,000.00 and he thought that this was a "generous allowance". He did not refer to the *actual allowance* to the "Appointees" of the Court on the previous application. They were allowed under one phase of their work $32,500, and a second phase, $12,500, on the third application $25,000, on the fourth application $35,000, on the fifth application $27,000, making a total of $132,500. The Court of Appeals also referred to the allowance of $18,000 to the petitioners and was silent on the allowance of the $132,500 to the Appointees of the Court.*

Services of the "Appointees of a Court" should be "closely scrutinized" by the "debtor", the "creditors" and by "the Court" (*Re National Accessories, Inc.,* 13

* See Exhibit M, pp. 170-173, 176, being the printed record in Case 415,, 320 U. S. 566.

F. Supp. 278, 281). In this case *there was no debt* contest the fees of the respondent as they were its ' ervisors''. Petitioner Gochenour was the only pers contest it, and his attorneys, the other petitioners, s not be penalized for performing their duty.

There was no evidence on the part of the appoi of the court as to any of the elements which are esse for the allowance of fees. They did not testify as t difficulty of the legal questions, the necessity and division of time between the three sets of attorneys clusive of the attorney in Indiana. The decision of Court (*In re Gilbert,* 276 U. S. 294) ''that the judg the Court in fixing allowances for services of court of should be most careful'' was completely ignored.

The Sixth Circuit itself announced the principle compensation to officers of a court who do not work contingent basis should be less than compensation t torneys who work on a contingency basis (*Re Detroi Bridge Co.,* 111 F. (2) 235, 251). In the instant cas Appointees did not work on a contingent basis and is therefore *no foundation* for the allowance of $6 The weight usually given to the findings of a Mast a Court is inapplicable to questions involving comp tion of attorneys. (*Columbia Life Insurance Co.* v. *K* 138 App. (2d) 382, 385.)

III.

The recovery of the $550,000 fund was the direct res the services performed by petitioners in the Howe Gochenour suits and in the petition for clarific which was permitted to stand as a petition for ins tions on the debtor to either sue or to permit petiti to sue in its name.

Prior to the decision of March 3, 1941 (118 F. (2d no action was pending against Ball. The Debtor's '' warm'' petition for instructions *was dismissed.* In

decision the court summarized the facts leading to the purchase by Midamerica for $318,000 collateral, then valued at $6,805,800 It referred to the filing of the Howe suit on September 11, 1939, which sought to recover the profits from Midamerica and its stockholders and which asked for leave to join the Debtor as a party, and to the answer of Debtor that the cause of action did not offer sufficient prospects for recovery but that it did not object to be joined as a nominal party. The court referred to the Master's recommendation that the Debtor should not be joined as a party because it was not alleged nor proved that it was a proper, necessary, or indispensable party, and that the Judge confirmed the recommendation on November 10, 1939. It stated that on October 11, 1939, petitioners commenced the suit against Ball which resulted in its dismissal by the Indiana District Court on the ground that the action belonged to the Debtor, and that on February 27, 1940, petitioners filed their petition to clarify or vacate the order of November 10, 1939, or in the alternative, that petitioners be permitted to prosecute these actions in the name of the Debtor; that Debtor filed on October 3, 1939, a petition for instructions and the Master recommended that the petition be dismissed, without prejudice, and that his report was approved on May 23, 1940. After stating these facts, the court said:

> "It is not the purpose of the Act to furnish immunity to wrong doing by corporate officers. On the contrary it is the plain duty of the court to direct the investigation of all substantial allegations of mismanagement or fraud. * * * *On the face of the information in the record there are reasonable grounds to believe that the officers of the Subsidiary-Debtor through their control, have improperly acquired its assets, and by reason thereof, have become indebted to the corporation to the extent of the profit they have realized by reason of their misconduct.*"

The court concluded:

> "While the petitions filed by appellants were not filed on behalf of the Subsidiary-Debtor, *nevertheless they will be treated as presenting sufficient facts to require the court to appoint an Examiner,* and if facts are produced upon a hearing which convince the court that suit should be prosecuted for the benefit of the Subsidiary-Debtor, against officers, stockholders and directors of the Midamerica Corporation, *an order will be entered authorizing the subsidiary debtor to prosecute the suit or if the court deems proper it may give appellants, as creditors of subsidiary-debtor the right to institute suit in its name* after indemnifying it against costs." (Emphasis ours.)

The mandate of the court was subsequently issued and petitioners conferred with Leckie, Fogg and Sharp on the draft of the order under the mandate. On April 23, 1941, there was a "conference" between Leckie, Fogg and Kellogg *concerning the mandate of the court in the Howe case* (R. 17). This resulted in further "conferences" among themselves, so that prior to the entry of the order on the mandate, they obtained, *ex parte,* on May 1, 1941 (R. 39-40), the authority to institute the suit and to appoint themselves as Special Counsel. After they succeeded in their efforts they approved the form of this order on May 12, 1941, which excluded the action against Ball because of the previous order of May 1, 1941 (R. 41). They claimed, and the Master and Judge sustained them, that this sudden change in their attitude to commence the action, without even awaiting the entry of the order on the mandate, was due to the decision of the court in affirming the order on the objections to the claims of Midamerica (119 F. (2) 231) and not to the decision of the court which *directly involved the question whether suit against Ball should be commenced* (118 F. (2) 89).

(a) The recovery of the fund resulted from petitioners' efforts.

Leckie and Fogg who claimed by their schedule to have conceived the cause of action on November 22, 1938, *did nothing for a whole year* with the cause of action (R. 7). Their next "research" was on August 23, 1939. They *became busy* in holding conferences *daily* for hours and hours *after* September 11, 1939, when the Howe suit was filed. They only devoted prior thereto 16 hours from November 22, 1938 to September 10, 1939, but after the filing of the Howe suit they spent most of their time in daily conferences (R. 8-19).

The Howe suit and the opinion of the court in that appeal forced them to act. They realized that creditors were pressing for action; they felt uneasy by the *admonitions* of the court and held "conferences".

The attitude of the Master to the petitioners appears from a cursory examination of the proceedings had before him and the treatment that he accorded to the "appointees" of the Court. He did not interrupt Mr. Sharp in his long narrative statement, except to help him out as to a date (R. 25-28), but he interrupted Mr. Abrams on every important issue in the case and even took the part of a witness in an attempt to contradict the testimony (R. 51, 52, 54, 55, 57).

(b) The record contradicts the statement of the judge.

The statement of the District Judge concerning his appointees and of his relations to the Petitioners speaks for itself. He stated that the action taken by the Petitioners "hindered" and "delayed" the prosecution of the suit against Ball on the part of his appointees (R. 95). How these suits "hindered" and "delayed" the

prosecution of the suit against Ball was not explained in his opinion. When these suits were filed, *no action was even pending,* and the Appointees had not yet received their appointment. The attitude of the Master to the Petitioners appears from his reference to the reversal of his recommendation and to the reversal of the order of the Judge (R. 71). The attitude of the Judge to his Appointees appears from his memorandum (R. 95 where he took all responsibility on himself to relieve his Appointees from any criticism.

The situation here is similar to the situation in *Mecartney* v. *Guardian Trust Co.,* 280 Fed. 64. There the intervention was opposed by all parties and a fund of $700,000.00 was recovered. The intervenor was allowed $15,000.00 instead of $75,000.00 and in increasing the allowance the Court said (page 68):

> "It is *apparent* from the remarks of counsel for the Trust Company above quoted that the opposition of counsel and of the officers of the Trust Company in charge of the litigation to the application of the stockholders to intervene and present the issue raised in their petition was *due to ill will towards claimant and prejudice against any suggestion which he might make.* It is not necessary to go far to find the cause."

The Court also said (pp. 70-71):

> *"The failure of the officers and attorneys of the Trust Company to present the issue raised by claimant after their attention had been called to it was not a simple error of judgment but was so palpably the result of prejudice against claimant and a desire to depreciate him and the value of his services* while counsel for the Trust Company that in our judgment it amounted to a breach of duty. It is highly probable that the Southern Company would *have escaped liability altogether if the issue had not been raised by claimant* in behalf of the intervening stockholders at the time and in the manner it was raised." (Italics ours).

(c) The rights of the creditors were protected by the petitioners.

The cause of action existed since September 30, 1935. The Statute of Limitations as to the Ohio defendants expired September 30, 1939. Although the "appointees" of the court claimed to have *conceived* the action against Midamerica on November 22, 1938, *they took no steps to prevent the distribution of its assets and did not even advise the court the results of their "researches", and "conferences",* nor did they communicate with any of the parties or even with "Mr. Sharp" the "appointee". Petitioners filed the Howe suit against Midamerica and its officers on September 11, 1939. The Master *found* in a previous report (R. 45) that the "Howe" suit was *"evidently filed to protect for creditors of subsidiary-debtor, their rights against Midamerica Corporation in case subsidiary-debtor abandoned, or showed no inclination to prosecute proper actions arising out of Midamerica Corporation transactions and actions."* The attention of the Debtor was *called to the fact that it was also necessary to file a suit in Indiana* against Ball and others who were non-residents in Ohio prior to the time when they filed the application for instructions. This was alleged in the petition for compensation (R. 20, par. 4), the truth of the allegations were testified to (R. 47-48) and *no evidence was offered tending to contradict it. Thereafter,* on October 3, 1939, Leckie and Fogg filed a petition in the name of the Debtor seeking instruction as to whether to start the suit. They made no recommendation however, to file the suit. They did not inform the Court in their application that they made a study of the facts and of the Statute of Limitations which would expire in Ohio on September 30, 1939 and in Indiana on September 30, 1941 and that they discovered all of the facts on November 22, 1938, nor did they

consider a question of *laches* which might have been interposed successfully by a further delay which defense is not governed by the Statute of Limitations. (*York* v. *Guaranty Trust Co.*, 143 F. (2) 503, 521.)

Petitioners filed their suit on October 11, 1939, in Indiana prior to the intervention of the Statute of Limitations. Respondents stood by and *permitted the dismissal of their petition for instructions* on May 1, 1940, and did not commence the action until *after* the rendition of the opinion on March 3, 1941 in petitioners' appeal which treated their petition in the nature of an intervening petition to *compel* the prosecution of the actions.* *The preservation of the cause of action* leading to the recovery of the $550,000 *was therefore the direct result of the decision of the court on petitioners' appeal.*

The contention that Respondents filed their Indiana suit not as a result of the opinion of March 3, 1941, but because of the affirmance of the orders on the claims of Midamerica on April 16, 1941 for the reason that they waited for a "*final*" adjudication on the claim is *unsound* because the court might not have rendered its opinion until after September 30, 1941, and in such event the entire cause of action would have failed because of the intervention of the Statute of Limitations in Indiana. They had no guarantee that the case would be decided sooner. They *risked* the action by the "delay" to be defeated by a *defense of laches,* which is not governed by the Statute. *Holman* v. *Gulf Refinery Co.*, 76 F. (1) 94, 99. This rule was applicable in Indiana and they risked the entire cause of action by the delay. (*Porter* v. *Hyne*, 7th Cir., 213 F. 154, certiorari denied 238 U. S. 620.) Besides, *the decision was not final* until the denial of the rehearing and the writ of certiorari on October 27, 1941

* Their schedule showed that they conferred between May 1, 1940 and May 1, 1941, concerning the settlement of the claim against Ball (R. 14-15), this being at the time when they had no action pending against Ball and prior to their appointment.

(314 U. S. 671). They *hastened* to obtain leave of court to file the suit on May 1, 1941, without notice, before the rehearing was disposed of, *and after they conferred with themselves on April* 23, 1941, *on the entry of the order under the mandate* pursuant to the opinion of March 3, 1941, with the result that they obtained their appointment on May 1, 1941, and the direction to file suit *ex parte* and were able to state thereafter in the order on the mandate that *it was no longer necessary, as it was already done.* If they intended to sue "Ball" and merely waited for the affirmance of the order on the objections to the claim, they would have urged that the ruling on the petition be *continued* until after the disposition of the appeal on the Midamerica claim.

(d) The record does not support the timing of the suit by the Judge.

The statement of the Judge in his memorandum (R. 95) that he was fully advised of the facts and "any seeming delay was the result of the court's own action" in determining *"the timing of the suit"* was evidently to justify the allowance of the $65,000 to his "appointees" and to deny any compensation to petitioners. If the Judge was "timing" the filing of the suit then why did he refer the application for instructions to the Special Master? He did not dismiss the petition because of *his "timing of the suit"* but because of the *Master's recommendation.* There is nothing in the record to sustain the statement that the *"timing" was discussed with the court or that the court "of its own action" determined the "timing" when to sue.* A court has no right to make statements on matters which are not supported by the record. Their schedule (R. 7-19) refutes any "timing" by the Judge.

The statement in the memorandum (R. 95) that "the charge of bad faith in respect of the court's appointed officers" is not only without any foundation but "tends to reflect on the court's own action in advising its own appointees that the time was not yet ripe for filing"* shows the attitude of the Judge toward Petitioners in denying any compensation to them and its attitude to its "appointees" in allowing them $65,000. Even if the court gave them *ex parte* advice it is not proper to consider it on objections to a Master's report when there is no proof to sustain such *ex parte* advice.

(e) The first step to recover the fund was taken by petitioners.

The Master states (R. 65) in his report that the *"first"* and *"concrete step"* for the foundation of the action *was the filing of the objections* to the Midamerica claims. He credited "Special Counsel" with this *first step* while in fact the first step was *taken by petitioners* when they filed their objections on August 17, 1937. Mr. Sharp who was the appointee of the Master *thereafter* adopted "substantially" the objections as found by the Special Master in his report of October 25, 1938 (R. 46).

(f) Petitioners made all facts available to respondents.

The facts for the "successful attack" were *discovered, compiled, analyzed,* and *made available* to "Special Counsel" *before* their appointment, by petitioners' Exhibit "H" which the Master failed to consider or to mention in his report. Under Point II (R. 60) subdivision (a): *"Plans to sell the collateral and acquire same for the personal interest of the Van Sweringens"* the details are shown. Under subdivision (c) entitled: *"Plans laid in the dark to purchase the property ostensibly in the name*

* We know of no case where a court has taken upon itself the duties and responsibilities of "timing" a suit, and to delay the action for a period of six years.

of Midamerica Corporation but in reality for Van Sweringens'' the story was presented in detail under subdivisions (1), (2), (3), (4), and (5) (R. 61-63). Subdivision (a) under the heading of *''Profit of Midamerica as the result of alleged purchase''* shows (R. 63) the huge profit made by Midamerica as a result of the purchase and all the securities were listed there. *The entire story,* in chronological order *was there told and made available* (R. 63-64).

In speaking of this exhibit the Judge said (R. 96), ''the matter contained in Exhibit 'H' was information largely obtained from Congressional hearings, and like other facts about the Van Sweringen enterprises and the Midamerica purchases from Morgan & Company, were fairly well advertised and certainly as open to the public knowledge as to these objectors.'' If this be true then it must have been known to the Court, to the Special Master, as well as to its ''appointees'' in 1936. Why was there no action taken by injunctive relief to prevent the distribution of the profits by Midamerica to Indiana residents which would avoid suing in a foreign state? Why was the ''timing'' delayed until *after* the distribution which compelled the court to dismiss the petition for instructions on May 1, 1940, because of the representation that it would require $25,000, to sue in a foreign court when this could have been prevented by the mere issuance of a restraining order? The answer is plain. *It is not sufficient that news items are published in newspapers.* One must be interested in a case to study the facts, to analyze them, and to apply the legal applicable principles to such facts, and to bring them to the attention of the court. These facts were compiled, analyzed, and brought to the attention of the court as well as all parties of record by

Exhibit "H" when the Senate Reports were in typewritten form before they were printed and circulated to the public. It required a great deal of study to compile and analyze these facts as testified to by Mr. Abrams (R. 48).

The fallacy of the statement that all of the facts pertaining to the Van Sweringen deals were known to the appointees of the court from the "newspaper clippings" that appeared in 1936 (which they introduced in evidence, over objection, as Exhibit "9") is best demonstrated by the fact that while Fogg and Leckie were appointed as "Trustees" of the Van Sweringen Corporation and as "supervisors" who, according to them, were charged with every duty and responsibility, they did not take any action to protect the noteholders of the $30,000,000 note issue which the Van Sweringen Corporation floated in the market and which would have been almost a complete loss if it had not been for the action taken by petitioner Abrams to protect the interest of the noteholders in a *class suit* which he filed in New York at about the same time that he filed his suit against Midamerica and the Ball Foundation. (*York* v. *Guaranty Trust Company of New York,* 143 F. (2d) 503.)* This case completely demonstrates the falsity of the contention that as a result of the "newspaper clippings" and as a result of "reports" that the Special Master received, they, the appointees of the court, were wholly familiar with all of the existing causes of action.

* The $30,000,000 notes are the same notes on which the Midamerica filed its claim for $13,784,000 and which the court allowed only to the extent of $2.00 (**Re Cleveland Terminals Building Company,** 119 F. (2) 231) on the objections of these petitioners. The subject matter was also involved in petitioners' appeal from overruling objections to the Morgan claims in which opinion the court found that it was tinged with fraud to the extent of over $5,000,000 (117 F. (2) 278).

The Judge stated in his memorandum (R. 97) that its "appointees" had testified in open court that they never saw Exhibit "H" nor did they see any similar document that resembled it before the hearing before the Special Master on the application for fees.

The evidence was that this document containing a synopsis of all the facts upon which the cause of action was based was filed with the Special Master as an Exhibit in 1937 (R. 89-91) and other attorneys testified that *they saw and examined the exhibit.* In the face of such evidence, the statement of the Judge that there was no evidence to contradict the statement of his Appointees, is unexplainable. Their failure to see the exhibit merely demonstrates their lack of diligence or negligence, and they cannot claim compensation for failure to perform their duties. The Court of Appeals did not agree with the Judge on this point because it found that this exhibit was duly prepared and submitted to all attorneys and filed of record (R. 104). In addition to the synopsis of the facts contained in that document, the entire cause of action was set forth in the complaints filed by the petitioners in Ohio and Indiana, which complaints were carefully examined by them as it appears from their schedule. These complaints must have been of benefit to them, for otherwise the Master would not have recommended compensation for services spent in the examination thereof.

The Master's Report was based on his assertion (R. 65) that the Appointees of the Court recovered the $550,000 by progressive methods, the first step being their objections to the claims of Midamerica. This statement was rejected by the Court of Appeals (R. 104, 105), and yet it approved the order of the District Court which was based on the unwarranted statement of the Master.

There appears in the record the order of the Special Master of October 25, 1938. There, the Master stated (R. 46):

> "A. B. Gochenour and certain other creditors of subsidiary-debtor filed joint objections on the allowance of the claim of Midamerica * * * . At the time of the filing of said objections, the claim had been admitted as true and valid by the subsidiary-debtor. * * *
>
> Thereafter * * * Special Counsel was appointed for subsidiary-debtor * * * subsidiary-debtor, thereafter, through said Special Counsel filed objections to the claim of Midamerica Corporation, the objections of subsidiary-debtor being *similar* to those raised by Gochenour, *et al.*"

IV.

The findings of the Master and the conclusions of the court that petitioners did not contribute anything to the recovery of the fund is contrary to the undisputed facts.

Not only is the finding of the Master that petitioners did not contribute anything to the recovery of the fund contradicted by petitioners' evidence and by the exhibits but it is also refuted by the testimony of Mr. Sharp to whom the Master gave credit for the recovery of the fund together with his associates as "Special Counsel".

(a) Respondents' evidence showed that they made use of the facts and theories which petitioners made available to them.

Respondent Sharp testified (R. 34):

> "And I suppose you want me to say that in addition to that, the ones that I mentioned before, we examined the pleadings and papers and records in connection with some litigation that you had started on behalf of clients that you represented, and we did examine those among others."

When asked to be more specific, he said (R. 34):

> "you objected to the claims of J. P. Morgan and Company, and had extensive proceedings before the Special Master and the court and the Circuit Court of Appeals in which you attempted to establish the position that the J. P. Morgan sale had been a fraudulent sale, the result of a conspiracy, and you went over a lot of ground in connection with that, and we looked into the things that you had set up there and examined the matters that had been brought out, and among the other things we did in preparation for handling this case we tried not to miss any bets or fail to follow any leads that might lead to something that would be of value in discharging the obligation that was placed upon us as the appointees of the court who had the responsibility of handling this matter."

He further said (R. 35):

> "there was a case filed by you and your associates on behalf of Howe and others * * * against Midamerica Corporation and certain Ohio defendants on September 11, 1939."

He was further asked whether it was true that the subject matter of the suit in the Howe case involved practically the same subject matter as was involved in the subsequent litigation against the Ohio defendants and he answered (R. 35): "Well, in part."

With his own order staring him in the face, the Master did not hesitate to say in his present report (p. 2):

> "This came (the $550,000 fund) by careful and progressive methods, the first concrete step was the successful attack by appellants, (special counsel) upon claims filed for allowance, by Midamerica Corporation against the Estate of the Debtor and Subsidiary-Debtor. With the first step successful, a strong foundation was laid for the basis of the recovery from the Ball interests and the property of Midamerica Corporation."

The Special Master deliberately *stripped the petitioners of these first steps which he said were the foundation for the recovery of the* $550,000 *fund* and gave the *sole* credit to Special Counsel who merely stepped into the shoes of the petitioners *after all the facts were made available to them,* and recommended the allowance to them of the entire fee of $65,000 and "nothing" to petitioners. To sustain such a report was a miscarriage of justice.

(b) The Howe suit in Ohio and the Gochenour suit in Indiana and the appeal resulting in the mandate to appoint an examiner to investigate the causes of action and to direct the subsidiary-debtor to either commence an action in its name or to permit petitioners to proceed with the action in its name resulted in the recovery of the fund and petitioners were entitled to reasonable compensation.

In referring to the Howe suit, the Special Master says in his report (R. 70):

> "Inasmuch as said suit was unproductive of results, and in no way assisted in the recovery of the assets, petitioners' services in connection therewith do not appear compensable."

The Master completely ignored the evidence, as well as his own report of October 6, 1941, which he filed in his role as Examiner. The undenied evidence showed that after the remandment of the case on the appeal from the order of November 10, 1939 (118 Fed. (2d) 89), directing the appointment of the Examiner to investigate the causes of action that the subsidiary-debtor should then proceed and on its failure to do so, appellants might proceed, "special counsel" obtained the order to file their suit without notice to appellants. Mr. Abrams testified (R. 51):

"Prior to the offer of settlement there was pending the Howe suit, which was not dismissed * * *. After the Examiner was appointed under the mandate the question came up what should be done with the Howe suit, whether it should be dismissed or whether the case should proceed. We had several conferences before the Special Master. The question whether the Howe suit should remain or be dismissed depended upon the question whether the Statute of Limitations may be urged and whether the Statute of Limitations was applicable to this kind of claim due to the fact that the subsidiary-debtor was in bankruptcy under Section 77B and there was the contention made that the 77B proceedings stayed the toll of the Statute of Limitations."

Mr. Abrams further testified that the Master in his role as Examiner asked for briefs on this point and a brief was submitted which called attention to a recent decision of the United States Circuit Court of Appeals for the Seventh Circuit* holding that the Statute of Limitations was not stayed during the pendency of the 77B proceedings. The Special Master interrupted and said (R. 51):

"My recollection, if I may interrupt, was that some informal memorandum was prepared by Mr. Abrams and sent down. I think it was something in connection with the Howe suit."

The Special Master also stated:

"I think at that time you claimed, Mr. Abrams, the suit filed by the subsidiary-debtor against Ball would be defeated on account of the Statute of Limitations. Of course that didn't happen."**

Mr. Abrams further testified (R. 51):

"* * * Thereafter another conference was held with the Special Master where it was disclosed that no plea to the Statute of Limitations was filed to the action

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* Narin v. McCarthy, 120 F. (2) 910.

** It "did not happen" because there was then pending the Howe suit, so that the defense would not have been available.

> and in the conference it was then determined that inasmuch as there was no plea to the Statute of Limitations filed the action of the Howe suit was no longer of any importance, and it was, therefore, agreed by all parties that the Howe suit be dismissed and that the Master and the special Examiner shall file a report with the Court that the Howe suit be dismissed as it was no longer necessary, and the Howe suit was dismissed."

The report of the Special Master concerning his recommendation to dismiss the Howe suit was introduced in evidence by the debtor as Exhibit 20. In that report the Master *then* stated (R. 45):

> "The Howe case, aforesaid, was evidently filed to protect, for creditors of subsidiary-debtor, their rights against Midamerica Corporation in case subsidiary-debtor abandoned or showed no inclination to prosecute, proper actions arising out of Midamerica Corporation transactions and actions."

He then referred in his report to the fact that after the filing of the mandate an order was entered on May 1, 1941, permitting Special Counsel to institute suit against Ball Foundation and stated in his report:

> "Your Examiner has thoroughly discussed with counsel for Subsidiary-Debtor, and with counsel for plaintiffs in the Howe case, the facts, the law and the practicabilities of the situation and counsel appear satisfied that a further prosecution of the Howe case, in view of the pending case against Ball and others in the Indiana court, cannot be productive of any substantial results, and that it is to the best interests of the estate that the Howe case be dismissed."

Compare the foregoing undenied testimony and the Master's report of October 6, 1941, in connection with the Howe suit wherein he stated that the suit was kept pending for the protection of the rights of creditors with his present report that the Howe suit was unproductive

of results and this Court will *visualize the unfairness and attitude of the Master toward appellants.*

In the face of such a record the Judge stated:

> "Nor do I think that there was anything in the Howe suit filed in August, 1939 (it was filed September 11, 1939), which contributed in theory or principle in respect of the debtor's claim against Ball which was not already understood by the court as well as by his special counsel."*

In speaking of the opinion which reversed his order on the motion to vacate or clarify his order of November 10, 1939, the Judge said (R. 95):

> "Neither in the so-called Howe suit, nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's special counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that court, might well have hindered or delayed the success of the Ball suit upon which recovery later was had."

These statements which are not based on competent evidence but on inferences and deductions from the documentary proof were not justified, and Court of Appeals was not bound by Rule 52 to accept such conclusions.

V.

The allowance of compensation for the recovery of funds is governed by rules of equity and is not confined to statutory provisions.

The allowance of fees in the instant case should be governed by rules of equity because the fund was recovered as the result of an equity suit.

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* If this was "already understood by the Court as well as by his special counsel", it would not have been necessary to refer the question whether to permit the Debtor to be joined as party to the Howe suit to a Special Master.

A court of bankruptcy is, in the final analysis, a court of equity and is governed by equitable principles (*re Commonwealth Light & Power Co.,* 141 F. (2) 734). This is particularly true in this case where the recovery was obtained from a plenary suit. The rule of law announced in *Sprague* v. *Ticonic Bank,* 307 U. S. 161, should be the guiding spirit. There the court said (p. 166):

> "Plainly the *foundation for the historic practice* of granting reimbursement for the costs of litigation other than the conventional taxable costs *is part of the original authority of the chancellor to do equity in a particular situation.*"

The opinion must be in accord with our view that equitable principles are applicable in bankruptcy, having cited *Trustees* v. *Greenough,* 105 U. S. 527, *which is not a bankruptcy case* but an equity case in support of the allowance to Respondents of compensation for the period prior to May 1, 1941. This decision should be equally applicable in allowing compensation to petitioners on equitable principles, particularly in view of the fact that General Order 44 is applicable *only* to the respondents and *not* to the petitioners who never claimed to act as the attorneys for the subsidiary debtor. It is, however, clearly applicable to the petitioners who represented the *creditors* and whose efforts contributed to the recovery of the fund. In the *Greenough* case, *supra,* the court said (p. 534):

> "The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund, *prevails in bankruptcy cases*".

The Court completely overlooked this rule which is applicable here.

VI.

General Order 44 in bankruptcy was improperly invoked against petitioners who did not claim to represent a trustee, a receiver or a debtor but represented creditors.

The services of the Petitioners were performed in reorganization proceedings under Section 77B and Chapter X of the Bankruptcy Act and the services were incidental to the reorganization proceedings.

(a) Petitioners performed their services in connection with the reorganization plans and no order was required for such purposes.

The Court of Appeals entirely overlooked the fact that the "chose in action"—the cause against Ball—*was made part of the reorganization plan by amendment to the plan of October* 15, 1940. The court entered an order on July 29, 1941, amending the plan of October 15, 1940 (Exh. "M", p. 13). In this order, the court approved the report of the Special Master of June 11, 1941, who recommended that the plan of October 15, 1940, be modified so that there would be transferred to the examiner appointed pursuant to the mandate of this Court "any and all other claims, choses in action, causes of action or actions, belonging to the Cleveland Terminals Building Company or its estate, of whatever kind or nature". The order of the court of July 29, 1941, *approved this recommendation and provided for the transfer to the examiner for the benefit of the estate* in connection with the reorganization plan *"all other claims, choses in action, cause of action or actions, belonging to the Cleveland Terminals Building Company"*. This amendment included the causes of action against Midamerica and Ball, upon which the recovery was had and upon which reasonable compensation is being requested of this Court.

The Court of Appeals affirmed the order below against Petitioners because of the application of General Order 44, which applies to attorneys for a receiver, trustee or debtor in possession (*Re Siegel,* 40 F. Supp. 67, 68). Petitioners never represented such parties but represented "creditors". They asked for compensation in connection with the reorganization plan. In their original petition for the allowance of compensation they stated in the petition that they did not desire any allowance at that time because the recovery had not yet been had.

(b) No order is necessary when the interest of the trustee is adverse to the interest of the creditors.

The opinion cites *New York Investors, Inc.,* 130 F. (2) 90, on the point that it is necessary to procure a formal authorization of the court to proceed in the name of the trustee or debtor in possession. The court overlooked the *exception* to the rule, decided in that case, *that where the debtor in possession* or the trustee *stands in an adverse position, then no such order is necessary.* In the instant case, the subsidiary debtor *stood in an adverse position* because it was itself a party to the fraud which was committed against the creditors. The subsidiary debtor, prior to the filing of the objections to the Midamerica claim, *had consented to the allowance of the claims because of its adverse position.* Under such circumstances, petitioners had the right to proceed without an order of court as held in the case which the opinion cites.

The above decision is cited in re: *Cook Motors* (52 F. Supp. 107). There the court discussed the question whether under Section 64 (a) of the Bankruptcy Act creditors who took steps to secure assets for the estate without authorization from the court are entitled to the compensation of their attorneys. The court pointed out that ordinarily no compensation can be allowed without

authorization. It also pointed out, however, that where a trustee or *debtor in possession stands in an adverse position,* that there is an *exception to the rule.* The court there said:

> "The reason for the rule is that usually the trustee and his counsel, each of whom has an official appointment, are the proper persons to determine whether a claim is worth prosecuting and to act in the light of their determination. A third person is often merely an officious intermeddler who may have partisan interests and who is quite likely to complicate and make move expensive the administration of the bankrupt's estate. *However, even in some of those circuits where the ordinary rule denies compensation to a volunteer creditor acting without advance authorization, the rule would probably not be applied in a case where a trustee in bankruptcy or his counsel is involved in a conflict of interests. In re New York Investors, Inc.,* 2 Cir., 130 F. 2d 90."

The court further said:

> "Where there is a conflict of interest of this sort and where the trustee in bankruptcy refuses to act, in my opinion the reason for the rule laid down in the case of *In re Eureka Upholstering Co., supra, disappears and the vigilant creditor may recover compensation under Section* 64, *sub. a* (1), even though he failed first to secure authority from the referee."

This court should bear in mind that by its answer to the *Howe* suit, the subsidiary debtor *abandoned* the cause of action against "Midamerica, its officers and assignees," as shown above and therefore, the language in the above case is *apropos.* There the court said:

> "The second part of the inquiry under Section 64, sub. a (1), is whether when, the trustee in bankruptcy having refused to act, a general creditor recovers for distribution among all claimants an asset which another creditor held as partial security for his claim,

that asset can be regarded as having been recovered, in the words of the Statute, 'for the benefit of the estate', or, on the contrary, only for some creditors at the expense of other creditors. In one sense, it is true that the estate itself is not enriched, for the margin between liabilities and assets has not been narrowed by the recovery. And yet, speaking loosely, Congress might correctly use the phrase to describe services which made assets available for general as distinguished from special distribution. Indeed, just such broad usage of the identical phrase appears in the sections governing preferential and fraudulent transfers. Section 60, sub. b. and Sec. 67, sub. a. (3). *Moreover, such broad usage is inconsistent with what appears to be the intent of the section, that anyone who justifiably and successfully acts in the place of the trustee in bankruptcy and not merely for his separate, individual interest should stand in the trustee's shoes for the purpose of recovering his reasonable expenses.* Therefore I am of the opinion that the referee correctly concluded as a matter of law that on his findings the claim of Gar Wood was entitled to priority. *In re Stearns Salt & Lumber Co.,* 6 Cir., 225 F. 1, 6; *In re Phoenix Hotel Co.,* of Lexington, Ky., D. C. E. D. Ky., 20 F. Supp. 240, 242; *In re Gem Stores Co.,* D. C. E. D. Ky., 23 F. Supp. 779."

VII.

The Court of Appeals failed to examine the foundation for the findings on which it affirmed the order below.

In the recent opinion of this Court in *Baumgartner* v. *United States,* 64 S. Ct. 1240, it said that while concurrent findings of two lower courts are persuasive, this does not relieve the reviewing court from the task of examining the *foundation of the findings* on cases brought up on appeal and the foundation of a finding depends on "the nature of the materials" on which the *finding is*

based. The seventh circuit took cognizance of the "admonition" by the court to examine "all foundation for the findings" (*H. Earl Cook* v. *Ball,* Nos. 8432-8433, July, 1944, not yet reported). The Sixth Circuit evidently overlooked it. The Special Master *based his findings on newspaper clippings* which were introduced as debtor's Exhibit 9, which were *clearly incompetent* (*Southern Publ. Co.* v. *Carin,* 144 Fed. 348). The Master also failed to consider Exhibit "H". He based his findings on his conclusions that the primary steps leading to the recovery were the objections which the respondents filed to the Midamerica claims. The trial court disregarded the Master's conclusion that petitioners were volunteers and held that even if they were volunteers, if their efforts contributed to the recovery they would be entitled to compensation. The Court of Appeals neither adopted the Master's report nor did it adopt the conclusions of the Judge, for it held that even if the services did lead to the recovery of the fund, the law prevented the allowance of compensation. This is based on a misconception of the facts and of the applicable principles of law.

The opinion presents an anomalous situation. On the one hand, the opinion states that it is the duty of the court "to avoid double expenses" and on the other hand, it sustained allowances to *three* sets of attorneys covering the period from November 28, 1938 to May 1, 1941, without any order for their appointment and without anything in the record showing why it was necessary to have three sets of attorneys, and in complete violation of General Order 44 which is expressly applicable to the respondents but which was wrongfully applied to the petitioners.

Conclusion.

We have shown that the court clearly erred in allowing $65,000.00 to its "appointees"; that it applied false legal principles in ruling on the objections to the Master's report and that its decree allowing such compensation was clearly erroneous. We have also shown that the court clearly erred in overruling the objections to the Master's report, in recommending no allowance to the petitioners and that the report lacked basic findings, and the recommendations were by a Master who was prejudiced and biased, and that the court failed to make basic findings when it sustained his report which lacked such findings. We have also shown that the decree is in conflict with the decisions of this court and with decisions of other circuits. It follows that the writ should be granted.

Respectfully submitted,

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(2)

OCT 7 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 471.

In the Matter of
VAN SWERINGEN CORPORATION, *Debtor,*
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN,
Executrix of the Estate of Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG, and I. WALTER SHARP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, THE CLEVELAND TERMINALS BUILDING COMPANY, SUBSIDIARY DEBTOR.

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BRIEF OF RESPONDENT, THE CLEVELAND TERMINALS BUILDING COMPANY, SUBSIDIARY DEBTOR.

OPINIONS BELOW.

The very illuminating opinion of the trial Court (R. 94-99) is not published; but it so clearly sets forth the fundamentals of this case, and the reasons for the decision, that we have included it as an appendix to this brief, and we

urge the Court at this point to turn to the appendix and read the opinion. It is not long.

The findings and recommendation of the Special Master appear at R. 64-74.

The opinion of the Circuit Court of Appeals appears at 142 F. (2d) 991, and also at R. 102-110.

QUESTION PRESENTED.

The single substantial issue joined by this respondent before the Special Master and the District Court was

> "How much compensation should be allowed to petitioners?"

This was a question of fact—a problem of the evaluation of services rendered or claimed to have been rendered.

The issue in the Circuit Court of Appeals was, and the issue here is,

> "Should this Court disturb the concurrent findings made below?"

I. COUNTER-STATEMENT OF FACTS.

Subsidiary Debtor had an apparent cause of action against George and Frances Ball Foundation, *et al.*, of Muncie, Indiana, which presented considerable difficulties. The District Court of Northern Ohio appointed Frederick L. Leckie, Joseph G. Fogg and I. Walter Sharp as Special Counsel to prosecute that cause of action. Special Counsel filed suit in the United States District Court for the Southern District of Indiana, prosecuted the same and eventually obtained a settlement of Five Hundred and Fifty Thousand Dollars ($550,000.00) which was approved by the District Court of Northern Ohio and paid to the Subsidiary Debtor in cash. Paul Y. Davis, a member of the Indianapolis Bar, appeared in said suit as local counsel associated with the above-named Special Counsel.

No other counsel appeared for Subsidiary Debtor in said suit or represented Subsidiary Debtor therein; never-

theless, Meyer Abrams and Harry J. Myerson, members of the Chicago bar, and Fannie B. Stern, Executrix of the estate of Joseph L. Stern, deceased, who was a member of the Cleveland Bar, filed an application for Twenty-five Thousand Dollars ($25,000.00) of fees and One Thousand One Hundred Sixty Dollars and Sixty-two Cents ($1,160.62) of expenses in connection with alleged services contributing to said recovery.

Subsidiary Debtor believes that said recovery was obtained solely through the efforts of the Special Counsel appointed by the Court and their associate counsel in Indianapolis, also appointed by the Court, and that said counsel are entitled to all of such compensation as the Court may see fit to award for such recovery. Subsidiary Debtor is content to leave the amount of such compensation of Special Counsel to the discretion of the Court, and, therefore, this brief makes no further comment thereon.

Subsidiary Debtor also believes that Abrams, *et al.*, contributed nothing towards obtaining said recovery and rendered no services therein which were beneficial to the estate. This brief is, therefore, filed in opposition to the application of Abrams, *et al.*, and confines itself to that issue alone.

Petitioners' Statement of Facts is inaccurate in various minor points, but for the limited purposes of this brief it is unimportant to dispute concerning them.

II. SUMMARY OF ARGUMENT.

The short and simple answer to this petition is that the issue raised was a question of fact; that the Special Master and the Trial Court both found the facts against petitioners; and that the Circuit Court of Appeals, following the recognized practice, refused to disturb those findings of fact "unless clearly erroneous," and found them not only not "clearly erroneous," but clearly correct. The Circuit Court of Appeals in addition pointed out that if petitioners

be viewed in their claimed capacity of quasi-counsel for Subsidiary Debtor, then they had no authorization under General Order No. 44, and accordingly could recover no fees in that claimed capacity.

The Special Master had concluded his examination of petitioners' claim by saying,

> "In view of all of the foregoing herein it appears apparent that petitioners contributed nothing to the recovery from the Ball interests and hence should receive no compensation predicated upon said recovery." (R. 72.)

In this conclusion he had the support of the Securities and Exchange Commission of the United States which had stated in the hearing,

> "* * * we have examined the application filed by these applicants and also the record of the entire proceeding, and we fail to find any substantial support for the assumption underlying that claim." (R. 59.)

The District Court in announcing its conclusion said,

> "I * * * am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball. My decision of disallowance is not based upon the theory that the objectors were volunteers, and for that reason not entitled to be compensated, but it is bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball, and are (not*) entitled to any allowance out of the settlement of the Ball suit." (R. 97.)

The Circuit Court of Appeals refused to disturb the foregoing findings of fact and said,

---

* The word "not" appears to have been inadvertently omitted from the printed record; but it will be found in its proper place as shown above in the original typewritten opinion sent up under Section 250.

"The judgment of a court of bankruptcy regarding allowances of attorneys' fees should not be disturbed on appeal unless there is a clear abuse of discretion amounting to a manifest disregard of right and reason. *Sullivan & Cromwell vs. Colorado Fuel & Iron Company,* 96 F. (2d) 219 (C. C. A. 10); *Abrams et al. v. Cleveland Terminals Building Company, supra.*" (R. 109.) *Gochenour et al. v. Cleveland Terminals Bldg. Co.,* 142 F. (2d) 991, 995.

The foregoing is sufficient to answer the entire petition, so far as it seeks to obtain fees for petitioners. For the convenience of the Court, however, we proceed to analyze the facts and arguments of petitioners as they appeared to the Special Master and the Trial Court, as disclosed by the recommendation of the former and the findings and opinion of the latter.

III. ARGUMENT.

1. APPLICABLE RULES OF LAW.

The sole issue discussed in this brief is whether or not Abrams, *et al.,* are entitled to any compensation whatever in the matter of said recovery. This question is one of which the Federal Bankruptcy Court has exclusive jurisdiction, even though the services were rendered in a plenary suit in another Court and in another jurisdiction. This principle was established in the very recent decision of the United States Supreme Court, in the case of *Brown et al. v. Gerdes et al., Trustees,* 321 U. S. 178.

The question thus at issue is one of fact. It, therefore, comes within the terms of General Order No. 47, which is made applicable to proceedings under Chapter X by General Order No. 52. General Order No. 47 provides that:

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, *and the judge shall accept his findings of fact unless clearly erroneous.* * * *" (Emphasis ours.)

The italicized part of this General Order indicates that the Special Master's findings of fact must stand unless they are clearly erroneous. The following sections of this brief will demonstrate that the Special Master's findings of fact are not clearly erroneous, but on the contrary are clearly correct. Before proceeding to that discussion, however, we wish to refer to other applicable rules of law.

General Order No. 47 is consistent with Rule 53 (e)(2) of the Federal Rules of Civil Procedure which again provides for acceptance of a Master's findings of fact "unless clearly erroneous," requiring that

> "In an action to be tried without a jury the court shall accept the master's findings of fact *unless clearly erroneous.*" (Emphasis ours.)

Article XIII of Chapter X covers the subject of "Compensation and Allowances" and prescribes the statutory rules for allowing compensation as follows:

> "Section 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge * * *."
>
> "Section 243. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

Under these provisions the only room for allowing any compensation to Abrams, *et al.*, lies in the phrase "in connection with the administration of the estate" which phrase appears in both statutes. Abrams, *et al.*, received no appointment from the Court and, therefore, may recover compensation, if at all, only as attorneys for creditors and only for services rendered "in connection with the administration of the estate." The matter against the Ball Foundation was a plenary suit against persons not connected with the estate of the bankrupt and not residents of the district, on a claim which was in existence at the time of the institution of the reorganization proceedings, and then passed to the Subsidiary Debtor in possession. It is within this narrow section of the administration of the estate that Abrams, *et al.*, as attorneys for creditors must find and point out services rendered by them "which were beneficial in the administration of the estate," if they are to establish any right to compensation herein.

If the services were not "beneficial in the administration of the estate," no compensation whatever can be paid for them. The above quoted statute sets out the circumstances under which compensation may be paid, and the only classification in which the instant case may be fitted is the one of services "which were beneficial in the administration of the estate."

When such a controversy reaches the Circuit Court of Appeals there comes into play the well-settled principle that the concurrent findings of a Special Master and of the Court below will not be set aside unless plainly erroneous.

This principle was recently reiterated by the Sixth Circuit in the case of *Abrams et al. v. Cleveland Terminals Bldg. Co.*, 136 F. 2d 537, (certiorari denied, 320 U. S. 788). The very same lawyers who are petitioners in this case were also in that case as appellants, seeking an allowance of fees of One Hundred and Seventy-two Thousand Two Hundred Dollars ($172,200.00) for legal services

in other parts of this Subsidiary Debtor's reorganization. Upon being allowed only Eighteen Thousand Dollars ($18,000.00) for legal services, they appealed. In a short per curiam opinion, the Sixth Circuit Court said:

> "(1) It is settled law, repeatedly asserted in this circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co.* (*Continental Casualty Company v. Harold H. Barnett, Trustee in Bankruptcy*), 6 Cir., 134 F. 2d 725, decided April 8, 1943; *Kowalsky v. American Employers Ins. Co.*, 6 Cir., 90 F. 2d 476, 480." (136 F. 2d 537, 538.)

Some of these same petitioners were also appellants in the case of *Abrams, et al., v. Scandrett, et al.*, 138 F. 2d 433 (certiorari denied, 321 U. S. 770), commonly known as the *Chicago, M., St. P. & P. R. Co.* case, wherein the Seventh Circuit Court of Appeals applied the same rule in the case of findings made by the Interstate Commerce Commission and concurred in by the District Court, saying at page 436:

> "From all the facts it is apparent that the Commission knew full well, from the record, the nature of the services rendered by each of the counsel and who had contributed anything of value to the estate. In this situation, for the District Court to have said that no substantial evidence sustains the Commission's conclusion that the services rendered contributed nothing of value would have been wholly unjustified. Nor is it for us, to examine the evidence to determine whether we would have entered the same finding * * *. The finding means merely that the services rendered contributed nothing of value to the estate."

In the case of *New Southern Ohio Gas Co. et al. v. Roush, et al.*, 138 F. 2d 411 (Certiorari denied, 321 U. S. 777), the Sixth Circuit again recently applied the same rule in the case of a referee's finding, saying that it—

> "* * * *should not be disturbed for anything less than a demonstration of plain mistake* (*Fruehauf Trailer Co.*

v. Bridge, 6 Cir., 84 F. 2d 660, 663; *Bagley v. Rowley*, 6 Cir., 127 F. 2d 139, 140)." (Emphasis ours.)

With these limitations and principles in mind, we proceed to discuss the services which Abrams, *et al.*, claim to have rendered, and the question of whether the Special Master's report and the Trial Judge's finding were "clearly erroneous" in finding that such services were in no degree "beneficial to the estate" and that Abrams, *et al.*, contributed nothing to the recovery that was made, or whether on the contrary such finding was amply supported by the evidence.

2. THE FINDINGS OF FACT BELOW WERE AMPLY SUPPORTED BY THE EVIDENCE.

The Special Master and the Trial Judge used the same language in their concurrent findings that petitioners "contributed nothing to the recovery." (R. 72 and 97.)

This finding is not "clearly erroneous." On the other hand it is supported by substantial and convincing evidence. The steps by which the Special Master arrived at this finding,* and to which he referred by his phrase "in view of all of the foregoing," and the various items of evidence in support thereof, are set forth in the remainder of this brief.

---

* The trial judge adopted the Special Master's finding *in toto*. The trial judge's order entered on the journal provides in part:

"3. That the 'Interim Report and Recommendations of Special Master * * *' filed April 15, 1943, and the notices, findings, proceedings and orders concerning the same, be and the same are hereby approved, adopted and confirmed as the notices, findings, proceedings and orders of this Court."

(This order is not printed in the record but is referred to at R. 99. For full text of the order see the typewritten document sent up under Section 250).

A. Petitioners' Claim that the Idea of Bringing Suit Against the Ball Interests Was First "Conceived" by Them is Refuted by the Evidence.

In spite of the fact that petitioners took no part in filing or prosecuting the case in which the recovery was made, they nevertheless claim some of the credit for the recovery. They base this claim of credit on an assertion that they were the first to "conceive" the idea of bringing the suit. This assertion is refuted by various items of evidence, as follows:

(a) In the Testimony of October 30, 1942, testifying in respect of his investigations in Washington and elsewhere in 1936 and 1937, the witness Abrams stated that it did not then appear to petitioners "that this would give a cause of action against Midamerica or its stockholders for the profits that it made as a result of that purchase." (R. 48.)

(b) He also testified that it "came to our mind in the middle of August, 1939." (R. 48.)

(c) On November 22, 1938, Special Counsel were already studying the problem, as indicated by the itemization of services attached to their application for compensation herein which reads:

> "Conference (Messrs. Leckie, Fogg, Petersilge and Resseger) on duties of Cleveland Terminals Building Company as result of decision of Special Master restricting Midamerica claims to amounts actually paid, especially with reference to theory that Midamerica acted as Trustee and as to whether Subsidiary Debtor should file suit against Midamerica, *et al.*" (R. 7.)

The fact that Special Counsel did not file their suit against Ball until 1941 is explained by their desiring the support of the anticipated decision upholding the objections to the Midamerica claims. This decision came from the United States Circuit Court of Appeals for the Sixth Circuit on April 16, 1941,* and nine days later Special Counsel filed their application for authority to institute suit against Ball Foundation, *et al.*

Concerning that Midamerica decision, Mr. Fogg testified:

> "It handed down a very broad and sweeping opinion. That is what we had been waiting for * * *." (Transcript of October 2, 1942, page 53.**)

At the same hearing Mr. Sharp testified:

> "* * * promptly after that decision (special) counsel made an application to the District Court for authority to institute suit against the Ball Foundation, Ball and their associates, and obtained authority to do so, * * *" (R. 30.)

(d) This waiting for the Midamerica decision and this application following promptly thereafter were referable to the intention of Special Counsel as shown to the Special Master in hearings prior to March 29, 1940, and reported by him in his report bearing that date and filed on April 1, 1940, in which he stated (Petitioners' Exhibit A herein, printed record of Case No. 8708, 6th Circuit, page 39):

> "Counsel for Subsidiary Debtor have indicated that they desire to await the outcome of litigation arising out of the objections to the claims of Midamerica Corporation against Debtor and Subsidiary Debtor before taking action with respect to the proposed suit against Ball and others, and that upon final disposition of the Midamerica claims, said counsel will again apply to the Court for suitable instructions in the premises."

It, therefore, appears that Special Counsel "conceived" the idea of suit against Ball Foundation, *et al.*, not later than November 22, 1938, whereas Abrams, *et al.*, did not have the idea until August, 1939; and further that Special Counsel had formed a definite policy of withhold-

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* *In re Van Sweringen Company; The Terminal & Shaker Heights Realty Company v. The Cleveland Terminals Bldg. Company*, 119 F. 2d, 231.

** Not printed in record. See typewritten transcript sent up under Sec. 250.

ing suit, within the limits available under the Indiana six-year Statute of Limitations (Testimony of Mr. Sharp, page 38 of transcript of October 2, 1942*), until the announcement of the expected favorable decision of the reviewing Court upon the Midamerica litigation.

If petitioners' claim to be compensated, in spite of their non-participation in the suit in which recovery was made, is to rest, like that of an alleged inventor in a patent case, upon priority of conception (and we deny that priority of conception establishes any right to compensation), then petitioner has failed to establish the fact of priority.

The Special Master's recommendation and the Trial Judge's finding on this point are not only not "clearly erroneous," but are clearly correct.

B. Petitioners' Claim That Their Indiana Suit Contributed to the Recovery is Refuted by the Evidence.

Although petitioners took no part in the prosecution or settlement of the suit in which the recovery was made, and were not counsel of record or authorized by the Court to act therein, they insist that the unsuccessful suit which they filed and prosecuted in Indiana nevertheless was a contribution toward the ultimate result and that for such alleged contribution they ought to be compensated. They intimate that their Indiana suit in some way operated to prevent the running of the Statute of Limitations and that it was filed by petitioners "upon ascertaining that it was not the desire of the Subsidiary Debtor, or of the other creditors to spend any money in the prosecution of the suit." This claim is refuted by items of evidence as follows:

---

* This part of the cross examination of Mr. Sharp was omitted by the appellants from their so-called printed record, without indication of any such omission. See typewritten transcript sent up under Sec. 250.

(a) Subsidiary Debtor's Exhibit 8* is a stipulation as to the respective Statutes of Limitation of Ohio and of Indiana. Summarizing, this stipulation shows that the Ohio statute provided

"* * * An action for either of the following causes, shall be brought within four years after the cause thereof accrued:

* * *

3. For relief on the ground of fraud; * * *."

On the other hand the Indiana statute provided

"The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterward: * * *

Fourth. For relief against frauds * * *."

How a suit in Ohio within the four-year statute could have operated to extend the six-year statute in Indiana has never been shown. Moreover the record of Special Counsel's suit in Indiana (in settlement of which the recovery was made) shows that the Statute of Limitations was never interposed as a defense. (Subsidiary Debtor's Exhibit 7*). The Special Counsel suit in Indiana was brought within six years and that was sufficient under the Indiana statute.

(b) Petitioners' Exhibit B, printed record of Case No. 7338, 7th Circuit, page 1, shows that their Indiana suit was filed on October 11, 1939.

Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 37, shows that it was not until the following day, October 12, 1939, that the creditors' meeting was held at which, and at adjourned hearings of which, the decision was reached "that the creditors do not desire that the Subsidiary Debtor incur, at the present time, the expense of prosecuting the cause set forth in the Application for Instructions." (Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 39.)

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* Not printed in record. See typewritten document sent up under Sec. 250.

It is, therefore, obvious that the written record constitutes denial of the petitioners' claim that they filed the suit "upon ascertaining" that the creditors did not desire to do so at the time named.

(c) The Abrams' petition for fees shows in its paragraph 7 that petitioners' Indiana suit was dismissed on the ground that petitioners' clients were not the proper parties plaintiff. (R. 21.)

Petitioners' Exhibit B, printed record of case No. 7338, 7th Circuit, pages 42 to 60 inclusive and especially pages 58 and 59, shows the grounds upon which Judge Baltzell held that petitioners' clients were not the proper parties plaintiff. He held that the suit was a derivative suit and could not be maintained in the absence of the corporation, to-wit, Subsidiary Debtor, to which the cause of action belonged. This decision was reached upon the motion of the defendant, Ball Foundation. (Abrams' petition, paragraph 7, R. 21.)

(d) Petitioners' Exhibit B, printed record of case No. 7338, 7th Circuit, page 8, paragraph 3, shows one item of the prayer in petitioners' Indiana suit. This item reads:

> "(3) That a receiver be appointed during the pendency of this cause to take charge of all of the property belonging to the trust estate and to hold same until the further order of the court, and upon recovery of the assets, due notice be given to all creditors for the purpose of filing claims with the receiver, so that proper distribution may be made after paying the costs of these proceedings and cost of administration."

This shows that petitioners' Indiana suit was an effort by petitioners to remove the asset from the bankruptcy court, to treat the asset as not a part of the bankruptcy estate, and to have it administered and divided under the control of a receiver appointed in a suit separate from the bankruptcy estate and in a district different from that in which the bankruptcy was pending. How to reconcile the claim that this suit contributed something to the bankruptcy estate with

the fact that it was really an effort to keep the asset out of the bankruptcy estate, has never been explained by petitioners.

Thus the Special Master's conclusion that petitioners' Indiana suit contributed nothing to the bankruptcy estate is not only not "clearly erroneous" but is in fact clearly correct. The record itself refutes petitioners' claim in this respect.

C. Petitioners' Claim That the Howe Suit Contributed Something to the Bankruptcy Estate is Likewise Refuted by the Record.

Still ignoring the fact that petitioners took no part in the suit in which recovery was made, either by way of prosecution or of negotiating settlement, petitioners claim that in some way their institution of the so-called Howe suit in the District Court of Northern Ohio contributed something toward making the recovery. This part of petitioners' claim is refuted by items of evidence as follows:

(a) The defendants in the Howe suit were not the same as the defendants in the suit in which recovery was made. Subsidiary Debtor's Exhibit 7* shows that the defendants in the complaint in that case were George A. Ball, Frank B. Bernard and George & Frances Ball Foundation. Not a single one of these defendants was a defendant in the Howe case. (Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 25.) The defendants in the Howe case were Midamerica Corporation and its original officers and directors, Bradley, Anzalone, Tomlinson and Murphy. How a suit against the one group could have contributed anything towards a recovery from the other group is not shown.

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* Transcript of record of Subsidiary Debtor's Indiana suit against Ball Foundation—not printed in the record. See original document sent up under Sec. 250.

(b) The Special Master's Report (R. 71) and the Subsidiary Debtor's Exhibit 31* show that the Howe suit was voluntarily dismissed by plaintiffs. This dismissal followed upon a report made by the Special Master acting in his capacity as an examiner in which he stated that

"* * * counsel appear satisfied that a further prosecution of the Howe case, in view of the pendency of the (Special Counsel's) case against Ball, and others, in the Indiana Court, cannot be productive of any substantial results, and that it is to the best interests of the estate that said Howe case be dismissed. Your Examiner concurs in such conclusions." (R. 46.)

It seems superfluous to point out that a case which was voluntarily dismissed by plaintiffs, and in which the defendants were not those who eventually paid the money that was recovered, could not possibly have contributed anything toward the recovery.

(c) The theory upon which the Howe suit was based was not the theory upon which recovery was made.

Petitioners' Exhibit B, printed record in case No. 7338, 7th Circuit, pages 18 to 24 inclusive, sets out the complaint in the Howe case. It was founded upon the theory of actual fraud and active bad faith. (Note the allegations concerning conspiracy and collusion on page 21, in paragraph 8, and the allegations concerning collusion and concealment on page 23 in paragraph 11.)

On the other hand the suit under which recovery was actually made was brought on the theory of constructive trust and a required accounting for profits. (See Subsidiary Debtor's Exhibit 7** and the complaint therein set forth.)

The Special Master's finding as to the Howe suit that "petitioners' services in connection therewith do not ap-

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* Notice of dismissal of Howe suit—not printed in record. See document sent up under Sec. 250.

** Not printed in record. See document sent up under Sec. 250.

pear compensable" (R. 70) is amply supported by the evidence that the suit could not possibly have contributed anything; for it was not against the parties who could or did eventually make payment, it was voluntarily dismissed by the petitioners, and it was brought on a different theory from that upon which the recovery was made. The Special Master's finding, therefore, is not merely not "clearly erroneous," but is obviously correct.

D. The Transactions Incident to Petitioners' Efforts to Have Subsidiary Debtor Made a Party to the Howe Suit Contributed Nothing of Benefit to the Estate.

Again, seeking compensation for alleged services outside of the prosecution and settlement of the suit upon which recovery was made and in which petitioners took no part, they assert a benefit to the estate in connection with their petition for clarification, which appears in Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, pages 48 to 50. This claim is overthrown by items of evidence as follows:

(a) The opinion of United States Circuit Court of Appeals for the Sixth Circuit constitutes refutation of this claim. The opinion appears under the title *Gochenour, et al., v. Cleveland Terminals Bldg. Co.,* 118 F. 2d, 89, and it confirms the Special Master and the District Court in their refusal to permit petitioners to make Subsidiary Debtor a party to the Howe case. It then proceeds to suggest the appointment of an examiner to investigate petitioners' suggestions that causes of action existed which were being ignored.

(b) The examiner's reports appear as Subsidiary Debtor's Exhibits 19 and 20 (R. 42-46). These reports of the Special Master, acting as examiner upon appointment pursuant to such suggestion of the Circuit Court, disclosed that said matters had already had the attention of the District Court and the Special Master.

(c) The District Court adopted said reports (Subsidiary Debtor's Exhibit 21*) and petitioners then voluntarily dismissed the Howe suit (Subsidiary Debtor's Exhibit 31*) and their Common Pleas Court case against the directors and officers of Subsidiary Debtor (Subsidiary Debtor's Exhibit 2, last page, item of October 21, 1941*).

(d) At the time of petitioners' argument before the Circuit Court, they knew that

> "The matters set forth in allegation 'a' (of their Common Pleas Court petition against Subsidiary Debtor's officers and directors) have (had) been previously examined into herein in connection with the objections of Gochenour, *et al.*, to the claim of J. P. Morgan & Company, filed in these proceedings." (R. 43.)

for petitioners had been counsel for Gochenour in said matter, *A. B. Gochenour, et al. v. J. P. Morgan & Co.*, 111 F. 2d, 378.

(e) At the time of the argument in the Circuit Court petitioners also knew that

> "The matters set forth in allegation 'b' were examined into and resulted in the realization of $240,000.00 for the benefit of the estate of Subsidiary Debtor herein." (R. 43.)

for petitioners were then active in the hearings in this proceeding in which said recovery was made.

(f) At the time of the hearing in the Circuit Court petitioners knew that

> "The matters alleged in allegations 'c,' 'd,' 'e,' 'f' 'g' and 'h' were made the subject of inquiry and included in the Interim Report of the Special Master filed December 31, 1936, * * *" (R. 43).

for petitioners were then counsel in these proceedings.

(g) At said time petitioners also knew that this Court had appointed Special Counsel in 1937 to pro-

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* Not printed in record. See original document sent up under Sec. 250.

tect the interest of Subsidiary Debtor in connection with claims against The Higbee Company; for petitioners were then counsel active in these proceedings. The same was true in the matter of the extension agreement of June 1, 1932, when made the subject of consideration by the Special Master. (R. 43).

(h) Petitioners at said time must also have known that

> "* * * counsel for Subsidiary Debtor (had) filed its proof of claim in The Higbee Company reorganization, pending in this Court, claiming certain assets which had been acquired from Midamerica Corporation, or its successors, by the defendants Bradley and Murphy, named in the Howe case aforesaid." (R. 45.)

(i) From their extensive investigations petitioners must also have known that the defendants Anzalone and Tomlinson named in said Howe case had made no profit from the Midamerica transactions. They must also have known that Midamerica's remaining assets were negligible in value. (R. 45 and Subsidiary Debtor's Exhibit 9, being copies of newspaper articles dated early in 1937, reporting the sale of Midamerica Corporation to George A. Ball and associates.)

The foregoing items of evidence give ample support to the Special Master's finding that petitioners' claim of having benefited the estate in respect of their petition for clarification was such that "The record does not appear to bear out this allegation." (R. 70.) Here again the record makes it impossible for petitioners to show that the Special Master's finding was "clearly erroneous." On the contrary the record shows that the Special Master's finding was absolutely correct.

At the hearing before Judge Jones, Appellants placed great reliance upon their so-called "Exhibit H" (R. 60-64) as indicating that they had thereby furnished the basis for the suit against Ball Foundation and the necessary facts therefor as early as October, 1937; and that Special Counsel

had used these facts and theories in preparing and prosecuting the suit and making the recovery thereon. However, Special Counsel each separately denied under oath having known anything of Exhibit H until too late for use in the Ball suit. The fact is that the information contained in Exhibit H had been elicited in the hearings before the Interstate Commerce Committee of the United States Senate, had been printed and published by that committee, and had been so sensational that they were widely copied and discussed in the daily newspapers at the time. As evidence of that wide public knowledge and discussion Appellee offered in evidence before the Special Master its Exhibit 9* which consisted of many excerpts from newspaper articles of December 9, 1936, and thereafter up to and including April 11, 1937. They may be found as the last exhibit contained in the binder of Appellee's exhibits above referred to. Objection was made to their reception in evidence; but they were admitted in spite of such objection. Their admission was obviously proper; for they were offered not to establish the factual matter therein contained, but merely to show the wide publicity given to the story which they purported to set forth.

Thus petitioners at this hearing before the District Judge hung their case upon the slender thread of their Exhibit H; but the testimony showed that Special Counsel had not known of its existence and that the facts had been available to them from other sources. This hearing before the District Judge, therefore, has the effect of confirming the findings made by the Special Master and concurred in by the District Court.

The record, therefore, establishes that the findings were amply supported by substantial evidence, and under the well-settled law expressed by the Sixth Circuit Court in

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* Not printed in Record. See typewritten documents sent up under Sec. 250.

Abrams, et al. v. Cleveland Terminals Bldg. Co., 136 F. 2d 537 (Certiorari denied, 320 U. S. 788), and *New Southern Ohio Gas Co., et al. v. Roush, et al.*, 138 F. 2d 411 (Certiorari denied, 321 U. S. 777), both of which are quoted at page 8 above, those findings, being the concurrent findings of the District Court and the Special Master, will not be disturbed by a reviewing court.

IV. CONCLUSION.

Shortly stated, therefore, the situation is shown to be that Special Counsel prepared the case in which the recovery was made, prosecuted the same and achieved a settlement; that petitioners took no part therein; that petitioners' claim for compensation resolved itself into a claim for something like a finder's fee, which of course is not recognizable in this sort of proceeding; that petitioners, however, in fact were not even the finders of the cause of action; that extensive newspaper publicity (Subsidiary Debtor's Exhibit 9*) and the published results of the Senate investigation had already made public property of the facts which petitioners claim they discovered; that these facts had also been specifically called to the attention of the Special Master by government investigators (R. 54, 55, 57, 58); that the possibilities of recovery became evident to all parties in these proceedings after the results of the case known as *A. B. Gochenour, et al., v. J. P. Morgan & Co.*, 111 F. 2d, 378 and *The Terminal & Shaker Heights Realty Company (formerly Midamerica Corporation) v. Cleveland Terminals Bldg. Company*, 119 F. 2d, 231; that compensation for petitioners' services in those cases, to the extent they rendered any service or were entitled to any fees, has already been awarded (decision of Judge Jones in this proceeding evi-

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* Not printed in record. See typewritten documents sent up under Sec. 250.

denced by opinion* filed August 21, 1942, and order** entered August 27, 1942, affirmed by the Circuit Court in its case No. 9425 under date of May 31, 1943, 136 F. 2d, 537, certiorari denied, 320 U. S. 788); that petitioners repeatedly attempted to prosecute actions for the pursuit of which the District Court had appointed others as Special Counsel; and that the detailed analysis set forth above shows that petitioners contributed no benefit to the administration of the estate for which compensation has not already been awarded and particularly no benefit in the matter of the recovery from Ball Foundation, *et al.*

This question of whether the petitioners contributed anything towards the recovery from Ball Foundation, *et al.*, is a question of *fact*. The Special Master's finding thereon is a *finding of fact*. Findings of fact by a Special Master, concurred in by the District Court, are adopted by reviewing courts "unless clearly erroneous." The Special Master's recommendations and the Trial Judge's findings of fact in this matter are not "erroneous" in any degree, clearly or otherwise. On the contrary, every one of them is supported either by petitioners' own admissions, or by the written records of the case, as detailed above.

In the light of the statutes providing the circumstances under which compensation may be paid and in the light of the requirement that the findings of fact below must stand "unless clearly erroneous" and of the showing above that each finding of fact is amply supported by the several items of evidence, it is submitted that the Sixth Circuit's refusal to disturb the Special Master's report and the decision of the District Court, in respect of the petition of Abrams, *et al.* were correct, that no compensation whatever

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* See pp. 205-207 of printed record of Case No. 9425, 6th Circuit, filed herein.

** See pp. 208-213 of printed record of Case No. 9425, 6th Circuit, filed herein.

should be allowed to them, and that the present petition should be denied.

Respectfully submitted,

J. Hall Kellogg,
Attorney for Subsidiary Debtor.

Hauxhurst, Inglis, Sharp & Cull,
Of Counsel.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

In the Matter of
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION, No. 40,954.

MEMORANDUM ON OBJECTIONS OF
A. B. GOCHENOUR, *et al.*

JONES, *J.*:

This matter is presented for hearing on the objections of Gochenour and others to the Master's report disallowing compensation to their attorneys and to the Master's recommendation for allowance of compensation to the special counsel appointed by the Court in connection with the suit and settlement of the debtor's* claim against Ball and the Ball Foundation. As the Judge in control of and familiar with the entire proceedings, and responsible for any suggested delay in bringing suit against Ball, I must frankly but justly say that these objectors had nothing whatever to do with the initiation of the Ball suit or the recovery thereon. As the attorneys for a group of bondholder credi-

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* Use of the word "debtor" herein refers to subsidiary debtor, The Cleveland Terminals Building Company.

tors, the applicants asked for the sum of $172,200.00 in connection with services claimed to have been performed in connection with the reorganization and in the objection to the claims of Midamerica and Morgan against the debtor.

It is my opinion that they were adequately compensated for any services performed by them in this reorganization. A generous allowance of $18,000.00 was recommended by the Master, who they seem now to intimate is in some way prejudiced. His recommendation of $18,000.00 was adopted by this Court and affirmed by the Circuit Court of Appeals on May 31, 1943. Any such intimation could, therefore, have no foundation in fact. It is my considered judgment that the Master has fairly appraised this claim to compensation and its disallowance in whole is in accordance with the facts and with my own sense of justice.

The suit against Ball, out of which the recovery of $550,000.00 was had, received its origin and impetus from the decision of this Court in respect of the claim of Midamerica against the debtor, as affirmed by the Circuit Court of Appeals. It was in that action that the legal and equitable status of the Midamerica securities and Ball's interest therein was laid bare and characterized. That decision was the basis of the suit finally commenced against Ball and declared the principles upon which recovery against Ball depended. No lack of diligence or good faith upon the part of this Court's supervising trustees, or its specially appointed counsel, occasioned any delay in bringing the Ball suit, nor did any action or prodding of these applicants hasten the filing of the suit.

This Court was fully advised and aware of the facts upon which recovery might be had, and any seeming delay was the result of the Court's own action in determining the timing of the suit. The charge of bad faith in respect of the Court's appointed officers filing the suit not only is without any foundation, but tends to reflect upon the Court's own action in advising its own appointees that the time

was not yet ripe for filing. Nothing that these objecting applicants did in respect of the Ball suit had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit, nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's special counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that court, might well have hindered or delayed the success of the Ball suit upon which recovery later was had.

Their institution of the creditor's suit against Ball in Indiana was without any authorization by this Court and contributed nothing but embarrassment and confusion for this Court and its special officers in preparing the proceedings on behalf of the debtor. This statement is supported by the opinion of Judge Baltzell in disposing of that suit. The fact is that the objectors brought the Indiana creditors' suit against Ball in Indiana at a time when the creditors of the debtor were considering the question as to whether this Court should authorize the commencement of an action against Ball on behalf of the debtor.

The same may be said with equal truth in respect of the objectors' efforts to bring in the debtor as a party to the so-called Howe suit filed and voluntarily dismissed in this Court. The inclusion of the debtor as a party defendant in the Howe suit would have created an anomalous and fruitless piece of litigation. Objectors sought to make the debtor a party defendant in the Howe suit in order to pursue Midamerica and certain local officers of that corporation, but such a suit could have led to no fruitful end since Midamerica then had no substantial assets and Ball

and the Ball Foundation were not within the jurisdiction of this Court. Upon what theory the dismissal of the Howe suit could be construed as a grant of authority for these objectors to bring suit against Ball in Indiana is not apparent. It is not consistent with orderly administration of an estate in bankruptcy reorganization to have unauthorized suits and proceedings commenced by creditors or others, where the Court has appointed officers to conduct the affairs of the debtor and to bring such actions as seem to the Court best calculated to preserve and protect the estate.

There seems to be some intimation or suggestion in the briefs of the objectors that special counsel were acting on their own behalf in seeking instructions from the Court and delaying, and then filing the suit as the result of the pressure of the objectors' clarification proceedings. For the instructions, for any asserted delay, and for the timing of the final filing of the actions against Ball, the Court in control of the proceedings takes entire responsibility.

At the oral hearing, it was first stated by the objectors that a certain Exhibit H was not included in the transcript of the record transmitted by the Special Master, and that in Exhibit H was to be found the evidence that the applicants first conceived and were responsible for the facts and theory upon which the recovery later was had against Ball. The matter contained in Exhibit H was information largely obtained from Congressional hearings and, like other facts about the Van Sweringen enterprises and the Midamerica purchases from Morgan & Company, were fairly well advertised and certainly as open to public knowledge as to these objectors. Later, however, applicants preferred to rely upon the filing of the Howe suit, in August of 1939, as their initial conception and disclosure of the facts and theory upon which the Ball suit was made manifest. It will be noted, however, that as early as November 22, 1938, almost a year prior to the filing of the Howe suit, the

Court's supervising trustees, Messrs. Fogg and Leckie, and special counsel Sharp, conferred on their duties as to bringing an action against Midamerica, as trustee, for breach of fiduciary relationship. And all of these matters had been disclosed in the objections to the claims of Midamerica in the Van Sweringen Company (real estate) reorganization before Referee William B. Woods, prior to May 31, 1939.

At the hearing, each of special counsel testified that he never received and never saw Objectors' Exhibit H, nor any papers of like import, before the hearing on these applications before the Special Master. The objectors claimed that they had Exhibit H at the hearing on objections to claims of Midamerica and Morgan, and while attorneys for Morgan & Company and perhaps some other bondholder representatives saw the exhibit, yet the objectors were unable to present any evidence to controvert the statements of the Court's special counsel that none of them ever saw such exhibit before the hearing before the Master on these applications. This evidence clearly refutes objectors' claim here that the Court's special counsel appropriated their conception and material as a basis for their suit against Ball. Nor do I think that there was anything in the Howe suit filed in August, 1939, which contributed in theory or principle in respect of the debtor's claim against Ball which was not already understood by the Court as well as by his special counsel.

I have considered carefully the oral arguments of counsel upon the hearing of the objections, the briefs, the record, and the Master's report, and am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball. My decision of disallowance is not based upon the theory that the objectors were volunteers, and

for that reason not entitled to be compensated, but it is bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball, and are not entitled to any allowance out of the settlement of the Ball suit.

Coming now to a consideration of the objections to the recommendation with respect to the application of Messrs. Fogg, Leckie and Sharp, who were appointed special attorneys by the Court to institute and prosecute the suit against Ball *et al.*: these attorneys were appointed on the Court's own responsibility, first, because they had no interest in or connection of any kind with the Van Sweringen enterprises; and, second, because the Court had confidence in their character and ability to conduct such important litigation. All three had had previous experience in the reorganization. Messrs. Leckie and Fogg, as the Court's independent supervising trustees, appointed in February of 1938, and Sharp, as a special counsel to represent the debtor, appointed in July and in August of 1937, where interlocking Van Sweringen interests had made matters complicated, and, as the Court believed, requiring independent representation, as recommended by the Master.

Messrs. Fogg and Leckie were appointed supervising trustees in February, 1938, as the result of a hearing in open court for which notice was given to all interested parties and a large representation was present and the matter fully discussed. No objection to the Court's proposal to appoint them as supervising trustees was voiced at that hearing, and no complaint or objection to their action or services has since come to the ear or notice of the Court. They were appointed supervising trustees and later special counsel in the hope of avoiding conflict and contention and of securing the maximum of disinterested service. It is my opinion that it has proved to have been in the best interests of the estate and its creditors.

The continued efforts throughout the proceedings, and briefs of the objectors, to discredit the efforts of the officers of this Court, and to gain credit for themselves, not only is unfair and unjust, but without the slightest support or justification. On the contrary, the special counsel, after several conferences with the Court, prepared the case against Ball and instituted the suit in Indiana upon the basis of the findings of this Court, as affirmed by the Circuit Court of Appeals, and it was upon those principles that the case was begun and prosecuted to a successful and, as I think, a highly satisfactory settlement under all of the circumstances. There is not the slightest ground for asserting that the suit and settlement were the result of the conception or actions of the objectors.

Although he had performed services directly related to the Ball matter, special counsel Sharp has asked for no compensation in respect of the settlement prior to his appointment on May 1, 1941. Messrs. Leckie and Fogg were appointed supervising trustees in February of 1938 and from November of that year and up to the date of their appointment as special counsel for the purposes of the Ball suit, they had, with the Court's approval, directed much of their time and attention to matters directly concerned with the proposed Ball litigation.

This situation is not like the ordinary bankruptcy where the Judge seldom has knowledge of the legal services performed and must rely upon the Referee's recommendations to a large extent. In this case, the Court has personal knowledge and a full understanding of the nature of the problems involved and the character of service required to be rendered. The nature, extent and value of the legal services required also are fully known and understood. No action of like character brought against a prominent and philanthropic citizen in his own bailiwick is dead certain of success. The charges must be skilfully drawn and the case fully prepared in advance, to insure the full

and careful consideration of the resident court. It is my considered judgment, based upon such knowledge and understanding, that the Ball suit was skilfully prepared and that the results achieved were due to that fact.

I have examined the application of special counsel and it is my independent judgment that the amount recommended by the Master is not in excess of a fair appraisal of the value of those services. It is not quite 12% of the amount of the settlement and is reasonable compensation for the services performed, within the meaning and intention of the Bankruptcy Act.

An order may be entered confirming the Master's recommendations.

(Signed) JONES,

United States District Judge.

November 9, 1943.

APPENDIX B.

Bankruptcy Act, Section 250.

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

(3)

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 471.

A. B. GOCHENOUR, MEYER ABRAMS,
HARRY J. MYERSON
and
FANNIE B. STERN,
Executrix of the Estate of
Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
FREDERICK L. LECKIE, JOSEPH G. FOGG,
and I. WALTER SHARP,
Respondents.

On Petition for Writ of Certiorari to
The United States Circuit Court of Appeals
For the Sixth Circuit.

BRIEF OF RESPONDENTS, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP, IN OPPOSITION TO THE PETITION.

Frederick L. Leckie,
Joseph G. Fogg,
I. Walter Sharp,
Counsel for Respondents.

The Gates Legal Publishing Co., Cleveland, Ohio—Main 5647

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A. B. GOCHENOUR, MEYER ABRAMS,
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Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
FREDERICK L. LECKIE, JOSEPH G. FOGG,
and I. WALTER SHARP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP, IN OPPOSITION TO THE PETITION.

QUESTIONS PRESENTED.

The questions resolved by the Special Master and the District Court were,—

1—What compensation should be allowed to Messrs. Frederick L. Leckie, Joseph G. Fogg and I. Walter Sharp, (Respondents, here) for their services as special counsel appointed by the Court, in the prosecution of a cause of action in favor of the Subsidiary

Debtor which resulted in the recovery of $550,000.00 for the estate?

2—Did the petitioners, counsel for certain creditors of Subsidiary Debtor, contribute towards that recovery?

3—If petitioners did furnish any such contribution, what, if any, compensation therefor should be awarded to them?

The issue before the Circuit Court of Appeals was, and here is,—

"Shall the findings of the Master and Court on these factual issues be disturbed"?

THE ANSWERS GIVEN BY THE LOWER COURTS.

Three tribunals, the Special Master, the District Court and the Circuit Court of Appeals have agreed,—

1—Upon the amount of compensation that should be awarded the Court's counsel, the respondents here; and

2—That the petitioners, counsel for creditors, were not entitled to compensation.

The Circuit Court of Appeals, while affirming these findings, also considered that the petitioners, as being in a sense, volunteers, would not be entitled to compensation even if their services had been beneficial to the estate (R. 109).*

THE NATURE OF THE PROCEEDINGS AND THE ORIGINS OF THE CONTROVERSY.

The controversy now before this Court arose out of certain corporate reorganization proceedings under Section 77B of the Bankruptcy Act, pending since October,

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* Printed Transcript of Record filed herein by petitioners, page 109.

1936, in the District Court for the Northern District of Ohio, Eastern Division, wherein Van Sweringen Corporation has been designated as "Debtor," and The Cleveland Terminals Building Company as "Subsidiary Debtor." The respondents, Frederick L. Leckie and Joseph G. Fogg, were appointed Trustees of the Debtor on February 9, 1937. The Subsidiary Debtor was allowed to remain in possession, but on February 8, 1938, the same respondents were appointed as its Supervisors. The order appointing them reads, in part, as follows (R. 6):

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, until further order of this Court, the Subsidiary Debtor shall continue in possession of its property and shall continue the operation of its business; provided, however, that such possession and operation shall be expressly subject to the supervision of Frederick L. Leckie and Joseph G. Fogg, heretofore appointed Trustees of Van Sweringen Corporation, and they are hereby authorized and directed to supervise and direct the management of the properties and the operation of the business of the Subsidiary Debtor as the same shall be conducted by its officers, employees and agents, *and to perform such legal services as may be proper in connection therewith*, provided, however, that said Frederick L. Leckie and Joseph G. Fogg shall have no duty to exercise any supervision and control over the action which the Subsidiary Debtor may take with respect to claims now pending in this proceeding (obviously claims *against* the Subsidiary Debtor), or with respect to any Plan of Reorganization herein."

Acting under this order, Messrs. Leckie and Fogg, during all of the period involved herein, functioned as supervisors of the Subsidiary Debtor's business, and as attorneys for themselves as such supervisors, and for the Subsidiary Debtor, in respect to all matters wherein *Special Counsel* were *not appointed* by the Court.

The respondent I. Walter Sharp has been special counsel appointed by the Court for the Subsidiary Debtor in various matters since July, 1937.

The petitioners, Meyer Abrams and associate attorneys now before this Court, have been functioning throughout the proceedings as attorneys for a group of creditors. They have been pertinaciously and ubiquitously active. Some results beneficial to the estate were thus achieved. For those they have already been compensated, having asked for $172,000.00 and having received $18,000.00. See *Abrams et al. v. Cleveland Terminals Co.* (May 31, 1943), 136 F. (2d) 537, certiorari denied 320 U. S. 788.

The case now at bar involves the awarding of compensation for services culminating in the successful prosecution on behalf of the Subsidiary Debtor of a plenary action in the District Court of the United States for the Southern District of Indiana, Indianapolis Division (R. 3) against George A. Ball and the Ball Foundation, which resulted in the obtaining of $550,000.00 for the estate of the Subsidiary Debtor which fund is now held in bank in special account. The respondents Leckie, Fogg and Sharp were the special counsel appointed by the Court who alone prosecuted the action and effected the recovery. That fact petitioners do not deny. It is their claim (R. pages 19 *et seq.*) that they discovered the facts and evolved the theories upon which the recovery was had and that they inspired, prompted or forced the institution of the action which resulted in the recovery, all of which respondents deny.

A terse summary of the cause of action thus prosecuted is found in the respondents' petition for compensation (R. pages 1 to 19)*. We quote briefly:

> "Your applicants state that the claims of Subsidiary Debtor in connection with which applicants rendered services covered by this application, were unliquidated and of an equitable nature involving long-

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* This is not printed in full. Most of the itemized schedule of services is omitted as well as the exhibits. Exhibit D to this petition was a copy of the complaint filed. (See R. 4.)

concealed breaches of fiduciary relationship and arose out of the purchase of assets owned by Subsidiary Debtor pledged with J. P. Morgan & Company in 1930 and purchased at a public sale September 30, 1935, by Midamerica Corporation, a corporation formed for that purpose of [by] O. P. and M. J. Van Sweringen, directors of Subsidiary Debtor, and George A. Ball and others and the distribution in liquidation of those assets to George and Frances Ball Foundation." (R. 2.)

THE FACTS FOUND BY THE SPECIAL MASTER AND THE DISTRICT COURT.

The application for compensation of Special Counsel, respondents here, and the petition for compensation filed by the petitioners, were heard before Charles I. Russo, as Special Master. In his report, appearing in the printed record, at pp. 64-74 inclusive, the Master first recounts the successive steps leading up to the recovery by the counsel appointed by the Court, and then concludes:

> "Taking into consideration all of the proper factors and elements, and allowing for some duplication of effort, among counsel assigned to the task, an allowance of Sixty-five Thousand Dollars ($65,000.00) appears fair and proper." (R. 66.)

(Special Counsel had applied for $75,000.00.)

Proceeding then to the petition for compensation filed by the petitioners here, Meyer Abrams, Harry J. Meyerson and Fannie B. Stern, as Executrix, the Special Master said:

> "Petitioners do not claim that Messrs. Leckie, Fogg, Sharp and Davis (Local counsel in Indiana), were not properly appointed, and acting; they do not claim that Messrs. Leckie, *et al.* did not perform the services alleged; they do not deny that the recovery was made, and they do not object to the allowance requested, but base their own (petitioners') claim for compensation upon their contention that the claim against the Ball interests, which resulted in the recovery was, to use petitioners' words '* * * conceived by your petitioners as a result of an investigation of the facts, a study

of the law, and the institution of a cause of action in the District Court of the United States for the Northern District of Ohio, and also in the District Court of the United States for the Southern District of Indiana * * *'." (R. 67.)

The Special Master then reviewed at some length the various claims of the petitioners and the evidence in the record concerning them, and concluded:

"It does not appear unreasonable to require that one who seeks compensation for services shall clearly point out a substantially definite accomplishment, or substantial contribution thereto, or the performance of pertinently proper services. The burden of justifying a requested allowance is upon the one who seeks it. Volunteers of unauthorized and useless services cannot be rewarded.

"In view of all of the foregoing herein it appears apparent that petitioners contributed nothing to the recovery from the Ball interests and hence should receive no compensation predicated upon such recovery." (R. 72.)

Upon this report, and the objections to it filed by the petitioners here, the District Court conducted an oral hearing on October 26, 1943, receiving some additional evidence on behalf both of Special Counsel and of the Objectors. (R. 84 to 94.) The Court's opinion and finding appear in the printed record, pp. 94 to 99. We quote brief extracts:

"The suit against Ball, out of which the recovery of $550,000.00 was had, received its origin and impetus from the decision of this Court in respect of the claim of Midamerica against the Debtor, as affirmed by the Circuit Court of Appeals. It was in that action that the legal and equitable status of the Midamerica securities and Ball's interest therein was laid bare and characterized. That decision was the basis of the suit finally commenced against Ball and declared the principles upon which the recovery against Ball depended. No lack of diligence or good faith upon the part of this

Court's Supervising Trustees, or its specially appointed counsel, occasioned any delay in bringing the Ball suit, nor did any action or prodding of these applicants hasten the filing of the suit." (pp. 94 to 95.)

"Nothing that these objecting applicants did (the petitioners here), in respect of the Ball suit, had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement." (p. 95.)

"I have considered carefully the oral arguments of counsel upon the hearing of the objections, the briefs, the record, and the Master's report, and am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, *and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball.* My decision of disallowance is not based upon the theory that the objectors were volunteers and for that reason not entitled to be compensated but it is *bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball,* and are not entitled to any allowance out of the settlement of the Ball suit." (p. 97.) (Emphasis ours.)

ARGUMENT.

I. The Facts Found by the Trial Courts are Conclusive Unless "Clearly Erroneous."

The findings of fact, both by the Master and by the Court, that the petitioners performed no services beneficial to the estate, and contributed nothing of value towards the recovery for which compensation is now sought, conclusively bar petitioners from any recovery unless such factual findings were "clearly erroneous."

General Order in Bankruptcy Number 47, following Section 53, 11 U. S. C. A., is made applicable to proceedings

under Chapter X by General Order Number 52. General Order No. 47 provides:

> "Unless otherwise directed in the Order of Reference, the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous. The Judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions."

General Order Number 47 is consistent with Rule 53 (e) (2) of the Federal Rules of Civil Procedure, which likewise provides:

> "In an action to be tried without a jury, the Court shall accept the Master's findings of fact unless clearly erroneous."

And when a case reaches a reviewing court, the same rule is applied that the findings of the trial court will not be set aside unless *plainly erroneous.* We quote from the opinion of the Circuit Court of Appeals in the case of *Abrams, et al. v. Cleveland Terminals Building Co.,* May 31, 1943, 136 F. (2d) 537, certiorari denied, 320 U. S. 788, at p. 538 of the Circuit Court of Appeals' opinion, as follows:

> "It is the settled law, repeatedly asserted in this Circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co. (Continental Casualty Co. v. Harold H. Barnett, Trustee in Bankruptcy),* 6 Cir., 134 F. (2d) 725, decided April 8, 1943; *Kowalsky v. American Employers' Insurance Co.,* 6 Cir., 90 F. (2d) 476, 480."

Of like import see

Abrams, et al. v. Scandrett, et al., 138 F. (2d) 433, certiorari denied 321 U. S. 770;

New Southern Ohio Gas Co., et al. v. Roush, et al., 138 F. (2d) 411;

Fruehauf Trailer Co. v. Bridge, 84 F. (2d) 660, 663; *Bagley v. Rowley*, 127 F. (2d) 139, 140.

II. On the Facts Found the Petitioners Are Not Entitled to Compensation.

Article XIII of Chapter X of the Bankruptcy Act 11 USCA, Sections 641 to 650, govern the award of compensation in corporate reorganization proceedings. Section 643 (243 B. A.) reads:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or *which were beneficial in the administration of the estate*, and to the proper costs and expenses incidental thereto." (Emphasis ours.)

Note that "the Judge shall give consideration only to the services which *contributed to the plan* confirmed or to the refusal of confirmation of a plan, or which were *beneficial in the administration* of the estate."

It is obvious that the services here involved had no connection with the approval or disapproval of any plan. If the petitioners performed any services falling within the purview of this section they must have been such as "were beneficial in the administration of the estate."

But the trial tribunals, the Special Master and the District Court, both found that issue of fact against the petitioners; found that they "contributed nothing to the recovery against Ball." (Opinion by District Judge Jones, *supra*, R. p. 97; see also the Master's Report quoted *supra*, R. pp. 64-74.)

These findings of Fact must be set aside as "clearly erroneous" before petitioners can prevail. *There is nothing in the opinion of the Circuit Court of Appeals to indicate any thought of setting aside the factual findings of the Master and District Court.*

III. The Circuit Court of Appeals Correctly Held That the Petitioners Would Not Have Been Entitled to Compensation Even if the Facts Were As They Claim Them to be.

Such, in essence, was the reasoning of the Circuit Court of Appeals. The Court did not undertake to set aside, or to find unsupported by the evidence, the factual findings of the District Court and of the Special Master. Rather, it recited the facts, in part as found by the trial court and in part as claimed by the petitioners (Appellants below), and then concluded:

> "Appellants, having been compensated for services rendered directly in connection with the reorganization, their claim here must be confined exclusively to beneficial services, if any, rendered to the Subsidiary Debtor in the prosecution of the claims against Midamerica Corporation and its assignees, the Balls and the Ball Foundation. The claim in question was in existence at the time of the institution of the reorganization proceedings. It was a chose in action which passed to the Subsidiary Debtor in possession and it was the duty of the Subsidiary Debtor in possession to collect it. The claim was merely an incident to the reorganization proceeding. Whatever appellants did about the claim was in effect as attorneys for the Subsidiary Debtor, and not as attorneys for creditors. * * *" (R. 108.)
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> "Under General Order 44 (11 USCA 52), an attorney for a receiver, trustee or debtor in possession can be appointed only on order of the Court granted upon a petition stating specified facts and the employment of the attorney must be for a specific purpose, unless the court is satisfied the case is one justifying

a retainer. General Orders have the force of law. *Weil v. Neary*, 278 U. S. 160, 169. This General Order cannot be by-passed by the creditors or their attorneys acting for the Debtor without the consent of the Court. Since appellants do not bring themselves within the General Order in question, it is immaterial whether or not their services were beneficial to the Subsidiary Debtor. They are entitled to nothing here." (R. 109.)

The Court therefore affirmed the District Court, (a) in the *allowance* made to Special Counsel, respondents here, and, (b) in the *disallowance* of claims of the counsel who are the petitioners before this Court. There is ample support for that action, in both of its phases.

The rule has been receiving increasing recognition in recent cases that no compensation should be allowed to attorneys who are not appointees of the Court, unless the following elements conjoin,—viz:

1. They are beneficial to the estate;

2. The Trustee refused to act; and

3. Formal authorization was procured from the court in advance for authority to proceed.

To this effect see:

In re New York Investors, Inc., 130 F. (2d) 90, syllabus 1;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599;

In re Progress Lektro Shave Corporation, 117 F. (2d) 602;

In re Postal Telegraph & Cable Corporation, 119 F. (2d) 861;

In re Eureka Upholstering Co., 48 F. (2d) 95.

Syllabus 1 in *In re New York Investors, Inc.* (C. C. of A., 2nd Cir.) 130 F. (2d) 90, reads:

"It is duty of trustee in bankruptcy to perform all services requisite to administration of bankrupt's es-

tate, and compensation may not be awarded from the estate to others than trustee and his duly authorized attorneys and agents, unless such others' services benefit the estate, and unless trustee has refused to act and formal authorization has been procured from court to proceed in his stead."

In re Porto Rican American Tobacco Co., 117 F. (2d) 599 on p. 602, column 1, it was said by the same Court:

"The services of the appellant, other than those relating to the preparation and filing of the petition, appear to relate to matters which concerned the interests of other parties to the proceeding more closely than the interests of the debtor. The appellant's services from the filing of the petition until the trustees came forward with their first plan necessarily pertained to the administration of the estate. This was the duty of the trustees and any legal services required in connection with administration should have been performed by their attorneys. This Court has held both under the old Bankruptcy Act and under section 77B that a volunteer, even if his services have benefited the estate cannot be compensated out of the estate for services which should have been performed by the trustee or his attorney, unless the volunteer is authorized by the court in advance of rendering the services. * * * *There is no reason for a different rule under chapter X.* For services pertaining to administration, since trustees were appointed and had their own attorney, the appellant must be regarded as a volunteer.

"For services rendered in opposition to the modified plan the appellant was duplicating the efforts of the stockholders' committee who also opposed it. * * * Certainly if the debtor is to supplement the efforts of the committees at the expense of the estate, the need of such additional services should be brought to the attention of the court, and authorization to serve for compensation should be obtained *in limine*. The same considerations which govern as to administration when there is a trustee should govern as to opposition to a plan when stockholders are already adequately represented." (Emphasis ours.)

Syllabus 2 in the case of *In re Postal Telegraph & Cable Corporation* (C. C. of A. 2nd Cir.) 119 F. (2d) 861, reads:

> "No compensation can be allowed out of debtor's estate for administrative services rendered in administration of estate in proceedings for corporate reorganization, unless the person seeking compensation prior to the performance of such services obtained authority from the court to so act."

The petitioners, here, meet none of these tests. The Master and Court found as a matter of fact that their services were not beneficial to the estate; *and so long as that finding stands it is of no consequence whether the other two tests are sound and in conformity with Sections 242 and 243 of the Chandler Act (Sections 642 and 643, Chapter 10, 11 U. S. C. A.), or whether the Court of Appeals in this case was correct in its position.*

But it is not inconsistent with Sections 242 and 243 upon which petitioners here chiefly rely (see their brief pages 6, 25, 59) and with the Act in its entirety, and with the orderly administration of estates *in custodia legis*, that volunteer attorneys should not presume to act as counsel for the estate, unless—

(a) The duly designated court appointees do *not* act or for some reason *properly should not* act; or

(b) The court first approves the proffered aid of the unofficial counsel.

That, in substance, is the position taken by the Circuit Court of Appeals in this case, and by other courts of high standing in the cases above cited. And petitioners here lay no claim to the existence of either of these other two prerequisites.

But the question is academic in the matter now at bar unless new factual findings are made.

IV. The Circuit Court of Appeals Also Correctly Affirmed the District Court in the Allowance Made to Respondents.

1. In Awarding Compensation in a Proper Proceeding, for Services Rendered Before It, a Court has Broad Discretionary Powers.

This Court said in the fourth paragraph of the syllabus in the case of *Page v. Rogers, Trustee in Bankruptcy*, 211 U. S. 575:

> "The amount of fees to which counsel for the trustee in bankruptcy is entitled is a matter for the bankruptcy court and in this case this court will not interfere with the amount fixed."

In the case of *In re Diamond Fuel Co.*, 6 F. (2d) 773, the Circuit Court of Appeals of the Second Circuit held, quoting paragraph 3 of the syllabus:

> "An order of the District Court allowing attorneys fees will not be reversed, unless unmistakably wrong as matter of law, or an abuse of discretion is shown."

In *Tennessee Finance Co. v. Thompson* (C. C. A. 6th Cir.), 278 Fed. 597, it was said by the Court through Knappen, *C.J.*, at p. 600 of the report:

> "It is the settled rule of this court that a finding by a referee in bankruptcy affirmed by the District Judge, will not be set aside on appeal on anything less than a demonstration of plain mistake. *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 158 * * *; *In re Sweeney*, 168 Fed. 612, 615 * * *; *Deupree v. Watson*, 216 Fed. 483 * * *. Such is also the rule in case of concurrent findings of master and judge. *Firestone Co. v. Riverside Co.* (C. C. A. 6), 247 Fed. 625, 160 C. C. A. 35, and cases cited."

It was held by the Circuit Court of Appeals of the Ninth Circuit in *In Re Barceloux*, 74 F. (2d) 288, quoting paragraph 5 of the syllabus:

> "Circuit Court of Appeals' power to review bankruptcy court's order allowing compensation to attor-

neys for trustee in bankruptcy, held limited to question of law whether there was manifest abuse of discretion (Bankr. Act, Sec. 24b, 11 USCA Sec. 47(b))."

These cases state the established rule. See:

In re American Range & Foundry Co., 41 F. (2d) 845;

In re Sheinman, 33 F. (2d) 901, 902;

Page et al. v. Rogers (6 C. C. A.) 149 Fed. 194;

Palmer v. Paramount Pictures, Inc., 85 F. (2d) 588;

Silver et al. v. Scullin Steel Co., 98 F. (2d) 503;

Mercantile Commerce B & T Co. v. Southeast Arkansas Levee District, 106 F. (2d) 966;

Campbell v. Green, 112 F. (2d) 143;

Forbes v. American Mail Line, 115 F. (2d) 196;

In re Postal Telegraph & Cable Corp., 119 F. (2d) 861;

Kowalsky v. American Employers Ins. Co., 90 F. (2d) 476;

In re Memphis Street Railway Co. (C. C. A. 6), 86 F. (2d) 891;

Sullivan & Cromwell v. Colorado Fuel & Iron Co. (C. C. A. 10), 96 F. (2d) 219;

Abrams v. Cleveland Terminals Building Co. (C. C. A. 6), 136 F. (2d) 537; certiorari denied 320 U. S. 788.

2. The Court Before Which Legal Services Are Rendered, in Fixing Compensation to be Paid Therefor, may Properly Give Weight to Facts Within its Own Observation and Knowledge.

We quote from the opinion by Judge Augustus N. Hand, in the case of *In re New York Investors, Inc.*, 130 F. (2d) 90, p. 92, second column:

"Although the RFC (the appellant) may have benefited the creditors by opposing the claims of the trustees and their attorneys for compensation, which are set forth in (b) and (c), yet it is a mere guess how

far, if at all, their efforts increased the sum available for distribution among the creditors and whether had there been no objections on the part of the RFC the Court would not have made the same allowances as it did. *Only the District Judge could have settled this doubt for only he could have known what affected his judgment in making the awards.*" (Emphasis ours.)

The same principle was expressed by Judge Woodrough of the Circuit Court of Appeals of the Eighth Circuit in *Cooke v. Bowersock, et al.* (Oct. 16, 1941), 122 F. (2d) 977, at p. 981, as follows:

> "The right of the appellees to an allowance is determined by 11 U. S. C. A. Secs. 642 and 643 as amended by the Chandler Act and as interpreted by the decisions, and the parties agree that the decisions recognize a discretion vested in the District Court and that *the appellate courts must give due regard to the opportunity of the District Judge not only to hear, observe and judge of the credibility of the witnesses, but also to familiarize himself with the proceedings and the services of counsel for which compensation is asked.*" (Emphasis ours.)

Syllabus 12 in *Silver et al. v. Scullin Steel Co.*, 98 F. (2d) 503, reads:

> "In reorganization proceedings, court of bankruptcy, in determining attorneys' fees of counsel of stockholders or creditors, must weigh the evidence, taking into consideration the self-interest of each applicant, *and in light of his familiarity with proceedings in his court* and with knowledge of value of services, which he is satisfied were actually rendered, must arrive at some approximately fair conclusion." (Emphasis ours.)

And in the article on "Attorneys" in 7 *C. J. S.* at p. 1093, it is said that the court may form an opinion of the value of the attorneys' services "from the *facts* or evidence before it."

Syllabus 1 in *Tracy et al. v. Spitzer-Rorick Trust & Savings Bank,* 12 F. (2d) 755, reads:

> "Fixing of attorney's fees in ancillary action to foreclose corporate mortgage and have ancillary receivers appointed rests in sound judicial discretion of judge in whose court services were performed, and judge is not absolutely bound by expert evidence as to value of such services, because he himself is an expert."

And in the opinion it is said further, beginning on p. 756, first column:

> "The matter of these allowances for fees was tried before the court. * * *.
>
> "With practically all of these services, *the trial court was personally familiar.* For, while many of the contested matters were litigated before the special master, it may be assumed that in all which were of any moment exceptions would be taken and fought out before the court. The basis for this assumption is not entirely clear from the record, which, however, does disclose that some 10 days were occupied in work in the District Court, and so, other entries regarded, this work must have been performed in matters of exceptions. *The trial court also personally knew,* whether appellants or local counsel had borne the brunt of this litigation, and which of such counsel had rendered the greater part or the more valuable services. After patiently hearing the expert witnesses, and Mr. Welles of appellant's firm, after considering the affidavits and the counter affidavit, *and in the light of his own knowledge,* the trial court allowed a total fee of $16,000.00 for the services to the receivers here in dispute * * *.
>
> "* * * The matter of fixing attorney's fees in a case such as this rests in the sound judicial discretion of the judge in whose court the services were performed." (Emphasis ours.)

The Court further quoted on p. 757 from the opinion of Judge Sanborn in *Farmers Loan & Trust Co., et al. v. McClure,* 24 C. C. A., 64, 78 Fed. 209 as follows:

> "The judge who entered this decree below *was familiar with the proceedings in his own court,* with the character of this litigation, with the controversies, if any, that had arisen in it, with the amount of services that had been rendered by each of the solicitors, and with every step that had been taken in the case. It is the settled rule of the federal courts that where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct." (Emphasis ours.) (78 Fed. p. 210.)

To the same effect see *Trustees v. Greenough,* 105 U. S. 527, 537; *In re Associated Towel & Linen Supply Co.,* 7 F. Supp. 699.

3. The Allowances Here Made Are Not Unreasonable.

In the Court of Appeals for the first time, petitioners attacked the amount of the allowance to respondents recommended by the Master and approved by the Court. Theretofore they had seemed merely to seek for themselves a part of it, or, perhaps, something over and above it.

The Master said in his report:

> "Petitioner do not claim that Messrs. Leckie, Fogg, Sharp and Davis were not properly appointed, and acting; they do not claim that Messrs. Leckie, *et al.,* did not perform the services alleged; they do not deny that the recovery was made, *and they do not object to the allowance requested.* * * *." (R. 67.) (Emphasis ours.)

And petitioners, in the objections which they filed before the Master, say:

> "There is, therefore, no basis for the allowance of the $65,000.00 *to them alone.*" (R. 80.) (Emphasis ours.)

And Paragraph One of the prayer to petitioners' objections filed to the Master's report reads in part:

> "WHEREFORE, Objectors (the petitioners) pray that the Master's report be rejected; that the recommended

allowance of a total fee for the recovery of the $550,000.00 *be divided.*" (R. 76.) (Emphasis ours.)

Petitioners *now* insist that the allowance was excessive (pp. 6, 21, 24, 38, 39, 40). They cite a number of cases which they assert support that thesis. Each case must stand on its own facts. Many other cases could be cited of contrary import. A relatively few of them are as follows:

In re Prudence Company, 21 F. Supp. 316, where fees in the sum of $50,000.00 were allowed for a recovery of $261,000.00.

Trautz v. Lemp et al. (Missouri Supreme Court), 72 S. W. (2d) 104, where fees totalling $63,200.00 were allowed for a recovery for a trust estate of stock valued between $310,000.00 and $465,000.00.

Hodgman v. Atlantic Refining Co., 8 F. (2d) 777, where in an equity case, fees were allowed upon the schedule of 33⅓% on the first $500,000.00; 10% upon the next $500,000.00, and 5% upon the excess over $1,000,000.00, the total recovery having been between three and four million dollars.

Regan v. Babcock, 196 Minn. 243, where in a taxpayer's suit, fees of $60,000.00 were allowed for a recovery of $390,000.00 for money illegally paid out on paving contracts.

Whitney v. New Orleans, 54 Fed. 614, where $66,600.00 was allowed for a recovery of $576,707.92.

In re Bignall, Bankrupt, 9 Fed. 385, where fees amounting to 20% of a recovery were held to be reasonable.

Murphy v. North American Light & Power Co., 33 F. Supp. 567, a derivative action, where $200,000.00 was allowed for benefits accruing as a result of the action, estimated by the Court to have been worth circa $900,000.00.

In re National Department Stores, Inc., 11 F. Supp. 633, where counsel for the receiver and debtor in a cor-

porate reorganization proceeding were allowed compensation in the sum of $50,000.00 for 1508½ hours of services of a general and miscellaneous nature.

In re Levinson, 19 F. (2d) 253, where counsel were allowed fees of $42,500.00 for bringing in to the estate additional assets of $165,608.00.

Page, et al. v. Rogers (6 C. C. A.), 149 Fed. 194, where a fee of $15,000.00 was allowed to the attorney for a trustee in bankruptcy for the recovery of a preferential transfer in the amount of $70,891.00.

In re People by Beha, State Superintendent of Insurance, 242 New York Supp. 100, where counsel were allowed a fee at the rate of $40.00 per hour for successfully defending an insurance company, having net assets of about $450,000.00, against liquidation proceedings instituted by the State Superintendent of Insurance.

Smith, Appellee v. Kroeger, Supt. of Building and Loan Assns., 138 O. S. 508, where it appeared that a fee was allowed to an attorney, who had successfully prosecuted a class suit, equal to 15% of the value of the fund thereby created by him, the fee totalling approximately $55,000.00.

Petitioners also complain because, as they say, Special Counsel's (Respondents') fees were calculated on a percentage or contingent basis (pp. 21, 24, 38, 39). This is not true. The Court was merely emphasizing the reasonableness of the allowance when it said (R. 99), "it is not quite 12% of the amount of the settlement."

It is hardly necessary to cite authorities to this Court that many considerations properly enter into the determination of a proper and equitable attorney's fee under given conditions. We quote for its persuasiveness from the opinion in the case of *In re Osofsky, et al.,* 50 F. (2d) 925, beginning in the first column, p. 927:

> "The elements to be considered in determining an attorney's fee were once most aptly summarized in evidence given on a reference by Honorable William G.

Choate, formerly a judge of this court, and David B. Ogden, Esq., a well known lawyer of a generation ago.

"They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand, but are to be fixed: (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

"Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.

"In some cases the time element is dominant; in others the skill used seems specially to stand out; and in others still, the amount which a defendant has been saved, or which a plaintiff has recovered, may be the dominating consideration in the charge. But if all these elements are considered together, and the relative importance of each element is fairly weighed by an attorney, it is possible to arrive at a proper charge in almost any case without much difficulty."

Also:

"In bankruptcy cases, however, there seems to me to be another element which has to be considered. That is the fact that in bankruptcy very often futile quests for assets have to be made. Many times, however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts. It is then a question, as in salvage at sea, of no cure, no pay.

"When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, create it, they should be well rewarded; otherwise there will

not be any incentive to attorneys to put forth their best efforts in cases which appear unpromising.

"Indeed the situation may very well be compared, as I have just hinted, to salvage at sea.

"In salvage cases courts have wisely come to think that, as a matter of public policy, it is necessary to give such adequate reward to a successful salvor as will make others to whom salvage situations are presented interested in attempting salvage operations. There must always be a flavor of generosity in the awards to success in order that an appetite for effort may be stimulated.

"This attitude involves a wise public policy and is as beneficial to shipowners, cargo owners, and underwriters in admiralty law as a similar attitude is to creditors in bankruptcy proceedings." (ibid. p. 957—1st and 2nd columns.)

In the *Osofsky* case, fees were allowed to the attorneys for a Trustee in Bankruptcy approximating 25% of the amounts recovered by them for an estate which otherwise would have been without assets.

In similar vein it was said in *Frink v. McComb,* 60 Fed. 486, at p. 489:

"There is no standard by which the compensation of counsel can be properly and definitely determined as to amount. The question, when presented at this time, must be decided upon considerations as vague and indefinite as when it was said in the Mirror (chapter 2, Sec. 5, that 'four things are to be regarded: (1) The greatness of the cause; (2) the pains of the serjeant; (3) his worth, as his learning, eloquence, and gift; (4) the usage of the court.' "

In the *Frink* case, fees aggregating 33⅓% were allowed for a recovery of $91,400.00.

Petitioners themselves have stressed the significance of *results* and the relative unimportance of time in appraising the value of legal services. Petitioner Abrams, in testifying before the Master on petitioners' application for $25,000.00 in fees, said:

"The Witness: I have practically stated in substance everything that was done in connection with this claim, *and our main basis for the fee is not the number of hours* that are scheduled—the number of hours in a case of this nature is not of great importance—but on the following things: that all of the facts which form the basis of the claim was supplied by us before anybody else knew anything about it, and that appears from the document that I have offered in evidence as early as 1937." (R. 52.)

And in their application itself, petitioners say:

"A separate charge and date for each item of service rendered by petitioners is not practicable and *would not serve fairly to apprise the court as to the value of their services.*

"Petitioners say that the fair and reasonable compensation for their services *in connection with the benefits rendered* to the estate are reasonably worth the sum of Twenty-five Thousand Dollars ($25,000.00)." (R. 24.)

It is not the fact that the Master and the Court arrived at the allowance they accorded, as upon a percentage or contingent basis. This is readily apparent upon an inspection of the Master's report and the Court's opinion, from which we quote, briefly below. They did, however, properly, stress results and benefits and the difficulties encountered.

The Master said in his report:

"Messrs. Leckie, Fogg and Sharp acted under the orders of the Court, and in pursuance and execution of the duties assigned to them, in performing the services which resulted in the recovery of this asset." (R. 65.)

"Briefly stated the asset recovered was not an apparent or known, asset, and was developed by applicants, from a more or less doubtful inchoateness to a cash recovery in the sum of Five Hundred Fifty Thousand Dollars ($550,000.00)." (R. 65.)

"Taking into consideration all of the proper factors and elements, and allowing for some duplication of effort, among counsel assigned to the task, an allowance of Sixty-five Thousand Dollars ($65,000.00), appears fair and proper." (R. 66.)

And it was said by the District Judge in his opinion rendered November 9, 1943, appearing in the printed Transcript of Record, pp. 94 to 99:

"The continued efforts throughout the proceedings, and briefs of the objectors, to discredit the efforts of the officers of this Court, and to gain credit for themselves, not only is unfair and unjust, but without the slightest support or justification. On the contrary, the special counsel, after several conferences with the Court, prepared the case against Ball and instituted the suit in Indiana upon the basis of the findings of this Court, as affirmed by the Circuit Court of Appeals, and it was upon those principles that the case was begun and prosecuted to a successful and, as I think, a highly satisfactory settlement under all of the circumstances. There is not the slightest ground for asserting that the suit and settlement were the result of the conception or actions of the objectors * * *."

"This situation is not like the ordinary bankruptcy where the Judge seldom has knowledge of the legal services performed and must rely upon the Referee's recommendations to a large extent. In this case, the Court has personal knowledge and a full understanding of the nature of the problems involved and the character of service required to be rendered. The nature, extent and value of the legal services required also are fully known and understood. No action of like character brought against a prominent and philanthropic citizen in his own bailiwick is dead certain of success. The charges must be skillfully drawn and the case fully prepared in advance, to insure the full and careful consideration of the resident court. It is my considered judgment, based upon such knowledge and understanding, that the Ball suit was skillfully prepared and that the results achieved were due to that fact.

"I have examined the application of Special Counsel and it is my independent judgment that the amount recommended by the Master is not in excess of a fair appraisal of the value of these services. It is not quite 12% of the amount of the settlement and is reasonable compensation for the services performed, within the meaning and intention of the Bankruptcy Act." (R. 98, 99.)

V. Petitioners' Arguments Answered.

Many of the arguments advanced or suggested by the petitioners have already been adequately answered. Some others we will now briefly note, as follows:

1. That the Circuit Court of Appeals did not agree with the factual findings of the District Court that the petitioners had contributed nothing of value to the estate in connection with the Ball recovery. (4, 5, 19, 20, 51, 63.)*

We believe a careful reading of the Appellate Court's opinion leads to quite a different conclusion. We find no intimation of a purpose to set aside the findings of fact of the trial tribunals or to adjudge them "clearly erroneous." Rather the Court's opinion is analogous to a plea by way of "confession and avoidance." It relates the facts, partly as found by the trial court, and partly as claimed by the petitioners, the appellants below, and then says in substance:

"Considering all they claim, still they are entitled to nothing here."

Taking that position, it was not necessary for the Court to assume the burden of reviewing and weighing the evidence, or even to be punctilious in a precise recital of it. Even much of petitioners' own brief is devoted to a recital of alleged "mistakes" of fact in the opinion.

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* References thus made are to pages in petitioners' brief.

2. That the "Chose in action," the case against the Ball interests, was made a part of the reorganization plan. (59.)

Petitioners thus attempt to meet the position taken by the Circuit Court of Appeals that their services were not rendered "in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan." (Section 643, 11 U. S. C. A.) But rather "in connection with the administration of the estate." (Ibid.)

The argument is that the allocation of the claim against the Ball interests was provided for in the Plan, since it was one of a group of claims that, by the terms of the Plan as adopted, were to be transferred to an examiner, "for the benefit of the estate."

This position is so forced as to fall of its own weight in the stating of it.

3. That General Order Number 44 should have been applied against the respondents so as to deprive them of any compensation for services rendered prior to the date of their formal appointment as Special Counsel on May 1, 1941. That as to services prior to that date respondents were volunteers. (2, 3, 4, 5, 6, 10, 15, 16, 20 to 29, 63.)

This position was also strenuously pressed by the petitioners before the Court of Appeals. It has a ring of superficial plausibility, which fades when the facts are fully understood.

Petitioners in their printed "Transcript of Record" cause to be set forth in full a copy of that portion of the itemized schedule attached to Special Counsel's petition for compensation which antedated May 2, 1941. (R. pp. 7 to 19.) It is their position that as to all these services respondents were volunteers. Let us "look at the record."

Mr. Sharp was appointed Special Counsel for the Subsidiary Debtor to represent it in connection with the Midamerica claims,* and the Subsidiary Debtor's interest in the affairs of The Higbee Company, in July and August, 1937, and so served continuously thereafter. (R. 27.)

On February 8, 1938, Messrs. Leckie and Fogg were appointed by the Court to supervise the affairs of the Subsidiary Debtor, "and to perform such legal services as may be proper and necessary in connection therewith" (R. pp. 6 and 7), with only two exclusions from their authority, viz:

(a) "With respect to claims (obviously claims *against* the Subsidiary Debtor) now pending in this proceeding"; and

(b) "With respect to any Plan of Reorganization herein." (R. 6, 7.)

Now the duties of these two supervisors, and their authority under this order, were plainly of sufficient scope to encompass, at least, the consideration and investigation of any and all assets of their charge, the Subsidiary Debtor, whether obvious or hidden, tangible or mere choses in action. They were responsible to the Court for the conduct of the Subsidiary Debtor. And the Court of Appeals of the Sixth Circuit had said in *Gochenour, et al. vs. Cleveland Terminals Building Company,* 118 F. (2nd) 89 at page 94:

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* Midamerica Corporation, dominated by the Van Sweringen brothers who controlled the Debtor and Subsidiary Debtor, and financed by George A. Ball, purchased much of the collateral sold at the Morgan auction sale of Sept. 30, 1935. Among the assets purchased were debentures that had been theretofore issued both by the Debtor and Subsidiary Debtor. Claims in these proceedings were filed on these debentures. Objections to such claims against the Subsidiary Debtor were filed and prosecuted by Mr. Sharp as Special Counsel. Corresponding claims against the Debtor were similarly opposed by Messrs. Leckie and Fogg as Trustees of the Debtor. Such objections were ultimately upheld by the Circuit Court of Appeals. See *In re Van Sweringen Company, etc.*, 119 F. (2d) 231; opinion rendered April 16, 1941. This case will be referred to further, *post.*

> "A debtor continued in possession under the present act has authority and *it is its imperative duty* with all diligence to collect the assets of the estate." (Emphasis ours.)

Thus, naturally and properly so functioning, they studied the possibilities of affirmative action on the facts and theories developed in the opposition to the Midamerica claims. They would have been remiss in their duties if they had done otherwise.

The services so rendered, wholly within the scope of their authority as Supervisors and counsel for Subsidiary Debtor, they included in their general fee bill which was acted upon by the Master in his report filed with the Court on May 23, 1942. (See Exhibit Number 28 of Appellees below, R. 47, not printed.) This report of the Special Master was approved by the Court on August 27, 1942.

Mr. Sharp likewise included in his general fee bill the services rendered by him in the same connection prior to May 1, 1941. (See his testimony, R. 26 *et seq.*)

The Master allowed to Mr. Sharp compensation for such services upon his part, but expressly postponed consideration of the services so rendered by Messrs. Leckie and Fogg. He said in his report of May 23, 1942 (Respondents' Exhibit 28, R. 47) at p. 25:

> "In many respects it is difficult to separate or recognize the services performed as legal services, as distinguished from the services required to be performed by petitioners as Supervisors. Said application includes extensive services rendered in connection with a certain claim and suit against George A. Ball and George and Frances Ball Foundation, which latter resulted in a recovery of approximately Five Hundred and Fifty Thousand Dollars ($550,000.00) in cash, from said Ball and Foundation. *As to the latter, the services can be better appraised upon new application to be made now that the Ball Foundation litigation appears to have been successfully terminated.*"

The Master's recommendations in this respect were duly approved by the Court.

So, *as expressly directed by the Court*, the services performed by Messrs. Leckie and Fogg, looking towards the ultimate Ball recovery, but actually performed while they were functioning as attorneys in matters under their supervision, were included in their petition for compensation which is now under attack. They are the items set up in the Printed Transcript of Record, pp. 7 to 19:

So the Master properly found:

> "Messrs. Leckie, Fogg and Sharp acted under the orders of the Court, and in pursuance and execution of the duties assigned to them, in performing the services which resulted in the recovery of this asset." (R. 65.)

Mr. Sharp testified at the hearing of October 2, 1942 before the Master:

> "One thing that perhaps calls for a little comment and explanation is that Mr. Leckie, Fogg and Sharp were appointed special counsel to bring this suit against the Ball Foundation and to handle all matters in connection with it by an order of court entered on May 1, 1941. The account of the services and detail of the services given in the application goes back to a much earlier date than that. I want to say that as to the services which are detailed, and the time which is detailed, prior to May 1, 1941, it includes only time of Mr. Leckie and Fogg and their offices. I did a great deal of work prior to that time but it was regarded as incidental to my duties and appointment as special counsel with reference to the Midamerica claim and the Higbee matter. And when my application was filed pursuant to the order of the Court setting forth the services and the claim for services down to August, 1941, all of the time that I had put in up to August, 1941, except that which was put in specifically on the Ball Foundation claim, after May 1, 1941, was included, and I think that the allowance which was made to me on that application must be considered to have covered those services.

> "Messrs. Leckie and Fogg also included in the claim which they filed at the same time as attorneys for the supervisors, for themselves as supervisors, *the services that they had performed in the Ball matter* down to the same date, but in the allowance which was made by the Master and confirmed by the Court with reference to their application, it was stated that *services performed in connection with the Ball claim and Ball litigation had been excluded and should be considered in connection with an application which would later be made with reference to services in the Ball matter,* so that the application is made up in that way *pursuant to what we have understood to be the desire and intention of the Court,* and it includes the work done by Messrs. Leckie and Fogg and their offices specifically with reference to the Ball Foundation and Ball and related matters prior to May 1, 1941, and the work done by all three of us and our associate offices since May 1, 1941." (R. 26, 27.)

So respondent, I. Walter Sharp, is not asking now for compensation for any services prior to May 1, 1941. He has already been awarded compensation for such services. Respondents Frederick L. Leckie and Joseph G. Fogg *are* asking for compensation for services rendered prior to May 1, 1941, contributing towards the Ball recovery which they properly rendered as the court-appointed counsel of the Subsidiary Debtor, consideration of which the Court, *by its own previous order,* postponed and allocated for determination in connection with the very application involved in the matter now before this Court.

So respondents neither claimed nor were awarded any compensation for services rendered as volunteers and without due court appointment. As to Messrs. Leckie and Fogg, the Special Master and District Court merely grouped in the one amount that was awarded, both the services that contributed towards this ultimate recovery that were rendered under their general appointment of February 8, 1938, and the services they rendered to the

same end under the special appointment and authorization to file suit of May 1, 1941.

4. That General Order Number 44 and the established principles invoked by the Circuit Court of Appeals do not apply here because the Debtor was in possession and was "in an adverse position" (60), citing *In re New York Investors, Inc.*, 130 F. (2d) 90; *In re Cook's Motors, Inc.*, 52 F. Supp. 1007.

But here, while the Subsidiary Debtor has been in possession, technically, in that title and actual possession of its assets had not been transferred to a Trustee, yet it has, at all times, acted under the strict control of Messrs. Leckie and Fogg as Supervisors appointed by the Court. For all practical purposes these two Supervisors have been as fully in possession and control as they would have been as Trustees, *and Petitioners do not claim that Messrs. Leckie and Fogg were in any sense adverse to the litigation, which they, in cooperation with Mr. Sharp, did in fact successfully prosecute.*

5. That Subsidiary Debtor and its counsel had "abandoned the cause of action against Midamerica, its officers and assigns." (61.)

By this specious plea, petitioners seek to qualify under prerequisite Number 2 for compensation to an unappointed counsel, specified in the opinion of the Court of Appeals (R. 109), "that the Trustee or Debtor in possession refused to act."

The so-called abandonment is alleged to have been made by the answer filed on behalf of Subsidiary Debtor in the so-called Howe suit, which answer is a part of the record in Case Number 8708 in the Circuit Court of Appeals of the Sixth Circuit decided March 3, 1941 and reported in 118 F. (2d) 89, the "Printed Record on Appeal," in which was petitioners' (appellants') Exhibit "A" in the courts below.

An examination of the complaint in the so-called Howe case, which was Case Number 19982 in the District Court for the Northern District of Ohio, Eastern Division, filed September 11, 1939, entitled "John J. Howe, *et al.* v. The Terminal & Shaker Heights Realty Company, formerly known as Midamerica Corporation, *et al.*," discloses that the cause of action set up in that complaint was not grounded on the constructive trust doctrine, which was successfully applied by the respondents, here, *defensively* against the claims asserted by Midamerica (see 119 F. (2d) 231, decided April 16, 1941),* and *affirmatively* in effecting the recovery against the Ball interests, compensation for which is involved in the matters now before this Court. Rather the theory of the complaint in the Howe suit was actual fraud, collusion and conspiracy, which doctrine the Circuit Court of Appeals of the Sixth Circuit rejected in the appeal on the Gochenour objections to the Morgan claim reported in 111 F. (2d) 378.**

Paragraph 8 of the Howe complaint reads:

> "During the month of August, 1935, with full knowledge on their part that said The Cleveland Terminals Building Company was hopelessly insolvent, the individual defendants herein and said O. P. and M. J. Van Sweringen and one George A. Ball, then and now a resident of the State of Indiana (and because of such nonresidence he is not joined as a defendant herein), *conspired together* to organize said Midamerica Corporation for the purpose of acquiring the property described in Paragraph 7 hereof, *at a collusive public auction sale* of said collateral scheduled to be had on September 30, 1935, for a nominal and grossly inadequate consideration in proportion to the fair market value, to the substantial benefit and financial profit of all of the defendants, and to the detriment of plaintiffs

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* *In re The Van Sweringen Co.*, 119 F. (2d) 231.

** *Gochenour, et al. v. J. P. Morgan & Co.*, 111 F. (2d) 378.

and all of the creditors of said The Cleveland Terminals Building Company."

And, as said by the Special Master in his report of October 6, 1941 (R. pp. 44-46), the assets of the defendant corporation were then "negligible in value" (R. 45), and the individual defendants, directors, had not personally profited.

So, the Subsidiary Debtor by its appointed supervisors and attorneys, wisely opposed participation in this particular lawsuit. But at no time did they in any manner indicate any abandonment of the rights of Subsidiary Debtor of any value. In fact *at the very time the Howe suit was filed, they were engaged in opposing the Midamerica claims, and were considering the use, and afterwards did use, those same facts upon the constructive trust theory,* in the successful prosecution of the rights of Subsidiary Debtor against the Ball interests.

6. That the Howe suit in the District Court for the Northern District of Ohio, filed on September 11, 1939 (R. 20) and the so-called Gochenour suit in the District Court for the Southern District of Indiana filed October 11, 1939 (R. 21) had the effect of blocking off the defenses of laches and the statute of limitations to the action filed by Special Counsel in May, 1941, which resulted in the recovery. (45, 46, 49, 56.)

These two actions were grounded upon a discredited theory, actual fraud, the same theory that the same counsel asserted in their unsuccessful effort to defeat the deficiency claim of $27,777,718.27 of J. P. Morgan & Co. (See *A. B. Gochenour, et al. v. J. P. Morgan & Co.* [Feb. 16, 1940], 111 F. (2d) 378.) These actions were also filed by and on behalf of a special class of creditors, who were adjudged, in both cases, *not to have title to the causes of action* they sought to prosecute. See *Gochenour, et al. v. George and Frances Ball Foundation, et al.,* 35 F. Supp.

508, affirmed 117 F. (2d) 259; certiorari denied 313 U. S. 566; *Gochenour, et al. v. Cleveland Terminals Building Company,* 118 F. (2d) 89.

We wholly fail to perceive by what process of reasoning it could be considered by anyone that the filing of these two abortive, ill-conceived and unsuccessful actions, in any manner could have created the result claimed for them, or wherein, in any manner, they benefited or "protected" the estate of the Subsidiary Debtor.

7. That the Special Master "based his findings upon newspaper clippings." (19, 22, 50, 63.)

These clippings were offered, and were received by the Special Master, *not* as evidence of the *truth* of the statements therein contained, but as evidence of a *general public dissemination* of those statements, tending to disprove petitioners' claims of a prior or exclusive knowledge of them, or of a sort of finder's interest in them. For the purpose of showing that petitioners did not furnish this knowledge they were both competent and convincing.

8. That the respondents were delinquent in their duties in that they took no action to prevent the distribution by Midamerica of its assets to George A. Ball and Associates. (45, 49.)

Petitioners are careless of the facts. The distribution was made in the spring of 1937. (See copy of complaint filed by respondents on behalf of subsidiary debtor against George A. Ball, *et al.,* Exhibit "D" to respondents' petition for compensation, R. 4.) This was *before* any of the respondents had been appointed counsel in any capacity for the subsidiary debtor.

9. That three sets of lawyers, and so many conferences between them were unnecessary. (30, 36.)

The Court named these three counsel. There were reasons why each was specially qualified because of his

previous connections with these Proceedings,—Mr. Sharp as Special Counsel for the Subsidiary Debtor in the Midamerica, Higbee and other matters, and Messrs. Leckie and Fogg as Trustees of the Debtor and as Supervisors of and Special Counsel for the Subsidiary Debtor.

10. That petitioners possessed prior knowledge of the facts that formed the basis of the Ball recovery and first made use of them in these proceedings. (3, 48.) Petitioner's Exhibit "H" (13, 17, 33, 48, 51, 63.)

Here again is a plain issue of fact. It was resolved against the petitioners. And upon ample evidence. All three of the respondents testified before the District Court (R. 84, 87, 89) that they had no recollection of having seen or heard of Mr. Abrams' mysterious Exhibit "H" before he produced it at the fee hearing before the Special Master. Likewise, Mr. Fiery, J. P. Morgan & Company counsel, testified that Mr. Abrams had prepared this exhibit in connection with his objections to the Morgan claim and that it had never become part of the record. (R. 89.)

The Master said at the hearing on the appellants' petition, October 30, 1942 (R. 57, 58):

"In view of your statement, Mr. Abrams, your previous statement to the effect that you were the first to call attention of the court to the matter of the Senate investigation, I think possibly I can clear that up by stating this: That on March 17, 1937, one Walter G. Mitchell, investigator for the Wheeler Committee, visited me here in Cleveland. Mr. Mitchell had formerly been an accountant with the F.B.I. and assisted me in preparing cases when I was in the United States Attorney's office, where the services of an accountant were needed, whether by the Post Office Department or the Bureau of Investigation. Mr. Mitchell advised me he was here to examine the records of the subsidiary debtor, and it is my recollection that I called there and suggested that they give him every courtesy and show him anything he wanted to see. He was here a few days. There was another man here assisting at the

time. He left and sent me some papers. The first papers I received were long, legal length size papers, appearing to be mimeographed or typewritten, having some of the proceedings of the Wheeler Committee. I think it is that Resolution 71 you have reference to.

* * * * *

"Thereafter I received steadily, as they were printed, the printed copies of the various reports as they came out and am still receiving them."

And Mr. Fiery, counsel for Morgan, also had copies of these typewritten reports. (Transcript of hearing, October 30, 1942, p. 32.)

And in the spring of 1937 there were newspaper accounts of the Senate investigation, disclosing to the world the essential, basic transactions. (Transcript of hearing, October 30, 1942, p. 47. For copies of some of such articles, see Subsidiary Debtor's Miscellaneous Exhibit No. 9.)

Even if appellants had been the very first ones having any connection with this proceeding, to know, and to bring forth, and to attempt to make use of these facts, *non constat* that the estate was thereby benefited. The typewritten reports and galley sheets, Mr. Abrams claims he was the first to peruse, were soon converted into printed Congressional records and reports for all to read. Advance information of them by brief space of a few weeks or months profited the estate nothing.

But assuming for argument's sake,—

(a) That appellants did first discover the facts, and further, that

(b) They never before had asked for or received compensation for the use which they made of those facts;

does it follow that they may rightfully claim a proprietary interest in such knowledge of past events,—whether public

or private,—especially in view of the fact that those events were brought to light by a tax financed investigation?

And if a lawyer does learn of given facts, in whatever manner, and in some pertinent court proceeding discloses those facts, must all lawyers thereafter punctiliously eschew the use of those facts on pain of rendering tribute to the happy discoverer?

11. That the petitioners evolved the theories upon which the Ball recovery was effected. (3, 23, 36, 48.)

This, also, is a question of fact that was resolved against petitioners, on ample evidence. Mr. Abrams, himself, admitted that it did not occur to him that there was any ground for affirmative action *until long after* the subsidiary debtor's Special and General Counsel (the respondents) had been formulating their plans for such action.

Mr. Abrams testified before the Special Master on October 30, 1942 (R. 48):

> "It did not appear to us—I mean the petitioners—that this would give a cause of action against Midamerica or its stockholders for the profits that it made as a result of this purchase, * * *."
>
> "The question whether or not an independent suit would lie against Midamerica and stockholders for the illegal profit, or the alleged illegal profits that it realized *came to our mind in the middle of August 1939,* * * *."

While the first item in the schedule attached to respondent's petition for compensation (R. 7) reads:

> "*Nov. 22, 1938* Conference (Messrs. Leckie, Fogg, Petersilge and Resseger) on duties of Cleveland Terminals Building Company as result of decision of Special Master restricting Midamerica claims to amounts actually paid, especially with reference to theory that Midamerica acted as Trustee and as to whether subsidiary debtor should file suit against Midamerica, *et al.*"

And following that first item are five additional items of a similar nature which *antedated* the filing by the petitioners of their so-called Howe suit.

Quaere, further, *whether petitioners could now in effect claim royalties* upon the subsequent use of legal and equitable doctrines, having once publicized them by use earlier in these proceedings, if such were the case?

> 12. That the institution by respondents, as court-appointed Special Counsel, of the Ball litigation that resulted in the recovery, was instigated by the decision of the Circuit Court of Appeals on March 3, 1941 in the case of *Gochenour, et al. v. Cleveland Terminals Building Company,* 118 F. (2d) 89 (Case Number 8708, record in which on appeal was appellants' Exhibit "A" below). (22, 24, 25, 40 to 54.)

This charge, and the denial of it by respondents, created a factual issue which the trial tribunals, the Special Master and the District Court, decided adversely to the petitioners.

The case referred to, as presented to the Circuit Court of Appeals, was an appeal by the same counsel who are petitioners now before this Court, from an adverse order made by the District Court denying a petition which they had filed in these proceedings, seeking an order, either,—

> (a) Adjudging that the alleged cause of action which these petitioners had set up on behalf of their clients in the so-called Howe suit filed by them on September 11, 1939 against Midamerica Corporation and certain of its Ohio directors, was a cause of action which was not vested in the Subsidiary Debtor; or
>
> (b) Adjudging that the Subsidiary Debtor had abandoned all its rights under such cause of action; or

(c) Directing the Subsidiary Debtor to join as a party in this action and in the action the same counsel had filed in the District Court for the Southern District of Indiana;* or

(d) Authorizing the petitioners to prosecute these two actions on behalf of the Subsidiary Debtor.

The Circuit Court of Appeals in the appeal reported in 118 F. (2d) 89, decided March 3, 1941, had reversed the District Court to the extent of directing the Court to appoint an examiner to determine whether the facts alleged comprehended a cause of action in favor of the Subsidiary Debtor of sufficient value or merit to warrant its prosecution "against the officers, stockholders or directors of Midamerica Corporation" (118 F. (2d) p. 95, second column).

It has been the claim of the petitioners that, spurred on, or inspired, by this order, the respondents, Messrs. Leckie and Fogg, had obtained the orders of May 1, 1941 (R. 39, 40), authorizing and appointing them and Mr. Sharp as Special Counsel to file the action against the Ball interests, which was filed on June 1, 1941, and which resulted in the recovery.

Neither the Special Master nor the District Judge found any merit in this claim. Judge Jones of the District Court said in his opinion overruling petitioners' objections to the Master's report:

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* This action, *Gochenour et al. v. George and Frances Ball Foundation, et al.*, 35 F. Supp. 508, had been filed October 11, 1939 and had been dismissed by the Court on February 24, 1940 on the ground that the cause of action therein set up could not be maintained as an independent class suit.

It may be noted parenthetically, that in this suit the Petitioners sought to appropriate, *for the sole benefit of a particular class of creditors*, the chose in action against the Ball interests. Having failed in that attempt *to take it away* from the general estate, they now *ask the general estate to pay them* for those efforts.

"Nothing that these objecting applicants (referring to the petitioners here) did in respect of the Ball suit had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit nor in other proceedings instituted by these objectors were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's Special Counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that Court, might well have hindered or delayed the success of the Ball suit upon which later recovery was had." (R. p. 95.)

That finding of fact was not "clearly erroneous."

Despite the activity of the counsel who are the petitioners, now before this Court, rather than because of it, the Court and its appointed counsel, pursued a steady, persistent course which, in logical sequence, culminated in the recovery here involved. Stages in that course were highlighted by the following:

(a) The appointment of the respondents, Messrs. Leckie and Fogg, as Trustees of Van Sweringen Corporation, on February 9, 1937, and, on February 8, 1938 as Supervisors of The Cleveland Terminals Building Company, and as its attorneys generally, save in certain excepted matters, chief of which were assigned by the Court to the respondent I. Walter Sharp, first appointed as Special Counsel for Cleveland Terminals Building Company on July 14, 1937.

(b) The filing by Messrs. Leckie and Fogg as Trustees of Van Sweringen Corporation, and by Mr. Sharp as Special Counsel for Cleveland Terminals Building Company, of objections to claims filed against the Debtor and Subsidiary Debtor, respectively, on

obligations of these two respective corporations which Midamerica Corporation had purchased at nominal prices at the auction sale of September 30, 1935. Such objections were grounded upon the doctrine that Midamerica became a *constructive Trustee* in such purchases because of the fiduciary relationship which its dominating directors bore to the Debtor and Subsidiary Debtor. (See testimony of Mr. Sharp at the hearing before the Special Master October 2, 1944. R. pp. 27, *et seq.*)

(c) The sustaining of such objections by the Special Master on October 25, 1938 (Ibid.).

(d) The consideration, shortly after that finding, and on November 22, 1938, by respondents Leckie and Fogg and their associates, of the advisability of filing suit on the same theory against the Ball interests (see itemization of services attached to respondents' application for compensation, R. 7), such action having been deferred because of an attempt by the Claimants to obtain a rehearing on their claims and objections thereto, and because of the subsequent proceedings before the Master, District Court and Circuit Court of Appeals, ending in the decision sustaining the objections by the Circuit Court of Appeals on April 16, 1941. (*In re Van Sweringen Company, etc.*, 119 F. (2d) 231.)

(e) The further study made by Special Counsel and by the Supervisors or General Counsel of the Subsidiary Debtor of the desirability of such action in August and September, 1939, because of the fact that September 30, 1939 would mark the expiration of the four-year period for the filing of an action grounded upon fraud under the Statutes of Limitation of Ohio, and the conclusion that the Indiana limitation of six years would govern as to an action filed in that state. (Transcript of hearing on October 2, 1942, R. 27, 28.)

(f) The presentation to Judge Jones of the District Court on September 26, 1939 by the Supervisors (Respondents Leckie and Fogg) of the Subsidiary Debtor of an application for authority to institute an action against the Ball interests, and the withholding of such application because of the view of the District Judge that the matter should be referred on an application for instructions, with opportunity to the creditors to express their views. (Testimony of Mr. Fogg, Transcript of October 2, 1942, p. 55.)

(g) The filing of such application for instructions on September 30, 1939; its reference to the Special Master on October 3, 1939; and hearing thereon on October 12, 1939, continued on October 26, 1939, and report thereon by the Master on April 1, 1940 (see R. 14), wherein the Master said:

> "*Counsel for Subsidiary Debtor have indicated that they desire to await the outcome of litigation arising out of objections to the claims of Midamerica Corporation against Debtor and Subsidiary Debtor before taking action with respect to the proposed suit against Ball, et al., and that upon final disposition of the Midamerica claims said counsel will again apply to the Court for suitable instructions in the premises.* (Emphasis ours.)
>
> "WHEREFORE, by reason of all of the foregoing, it is respectfully recommended that the application of Subsidiary Debtor for instructions be dismissed without prejudice to the Subsidiary Debtor to file further application at such time as Subsidiary Debtor, in the proper presentation and administration of the estate herein deems it necessary so to do."

(h) Continued study of the factual and legal background of the proposed litigation against Ball, coupled with negotiations between the appointed counsel of Subsidiary Debtor and representatives of the Ball interests for a settlement of the claim. (See item-

ized schedule of services attached to application for compensation by Special Counsel. [Respondents] R. pp. 7 to 19.)

(i) The favorable opinion by the Circuit Court of Appeals on April 16, 1941 (119 F. (2d) 231) on the Midamerica appeals, for which counsel were waiting as indicated by the Master's report, *supra.*

(j) The immediate preparation and filing of an application with the Court by Messrs. Leckie and Fogg as Supervisors and General Counsel of Subsidiary Debtor, asking specific authorization for the filing of the Ball suit which resulted in the granting of such authorization and of the appointment of them and of Mr. Sharp as Special Counsel to prosecute it. (R. 30 *et seq.*)

(k) The actual filing of complaint in such action on June 1, 1941, which was followed by intensive and extensive work in preparation for trial, coupled also, concurrently, with negotiations for settlement which ultimately resulted in an opportunity to compromise and settle the claim, which was duly presented to and approved by the Court on January 29, 1942 (R. 46), and which settlement petitioners, here, approved.

The Special Master and the District Court had personal knowledge of all of these multitudinous activities by Special Counsel (Respondents), which in planned logical sequence led up to the filing of the actions against the Ball interests and to the recovery. They also are reflected in the evidence offered at the hearings on their petition for compensation.

It, therefore, clearly appears that the findings of fact by the trial tribunals were not "clearly erroneous." In fact the findings clearly accorded with the weight of the evidence.

13. That the Securities Exchange Commission "recommended a maximum allowance to petitioners of $5,000.00 *and* their expenses." (9.)

Let the record speak for itself. We quote the statement (R. 58, 59) made by Mr. Ainsworth, attorney for the Securities Exchange Commission, at the hearing before the Special Master on the fee applications held on October 30, 1942:

> "Mr. Ainsworth: The Commission objects to an allowance on this application in the amount requested. We submit that the services involved were of no direct benefit to the Estate except to the possible extent that research or work done by these applicants in conducting their own independent litigation may have later been of some assistance to special counsel in connection with their assertion of the claim against the Ball interests. For any incidental value which the services may have in that sense we feel an allowance of $5,000, *including* expenses, would be an outside maximum. The applicants do not, as we understand it, claim to have participated in the litigation or negotiations which actually produced the Ball settlement. They base their claim, again, as we understand it, primarily on the theory or assumption that the assertion of claims by the subsidiary debtor against Ball was precipitated by their own efforts in obtaining the appointment of the Examiner, and that in the absence of such fraud special counsel for the debtor would either have failed or refused to assert claims against Ball. The Commission has not been a party to this proceeding during all of the period in question, but we have examined the application filed by these applicants and also the record of the entire proceeding, and we fail to find any substantial support for the assumption underlying that claim. On the contrary, the indications are, we feel, that the assertion of claim on the part of the subsidiary debtor against Ball was a logical aftermath of the Midamerica claim litigation. The Circuit Court, in its decision limiting the Midamerica claims to costs, established the impropriety

or invalidity of the Midamerica purchase, and strongly suggested the possibility that the debtor might be able to recover any profit realized on the part of any of the participants in Midamerica. We recognize that these applicants participated to some extent also in the Midamerica claim litigation, but their services in that connection have been the subject of an earlier application and that application has already been disposed of." (Emphasis ours.)

We do not consider this as *recommending* $5,000.00 or any other sum.

CONCLUSION.

No error of law is found in the judgment of the Circuit Court of Appeals.

Even if the contrary were true, such error would be inconsequential unless the factual findings of the Special Master and the District Court were set aside.

Such findings were not "clearly" or "plainly" erroneous. They were supported by ample evidence and accorded with the weight of the evidence.

Respondents believe that the compensation awarded them was merited. They are conscious of no moral obligation to share it with others whose activities have not been helpful.

Respectfully submitted,

FREDERICK L. LECKIE,

JOSEPH G. FOGG,

I. WALTER SHARP,

Respondents.

(4)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 471

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP,
Respondents.

On Petition for Writ of Certiorari.

PETITIONERS' REPLY.

MEYER ABRAMS,
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Of Counsel.

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STATEMENT.

The "debtor" and the "appointees of the Court" have unnecessarily burdened this Court with separate Briefs. The debtor's Brief is confined to the discussion of the denial of compensation to Petitioners, while the Brief of the other Respondents (who prepared the debtor's Brief) discusses both phases, the denial of compensation to Peti-

tioners, and allowances to them, repeating the argument in debtor's Brief which they prepared in its name. For these reasons, it will not be necessary to reply to the debtor's Brief and this Reply is only to the Brief of Respondents, Leckie, Fogg and Sharp.

Instead of discussing Petitioners' Brief chronologically, answering Points I and II (pp. 26-40) concerning the $65,000.00 allowance and discussing thereafter Points III and IV (pp. 40-57) concerning the denial of any allowance to Petitioners, they, for obvious reasons, confused the issues, reversed the order, discussing in the Brief under Points I, II and III (pp. 7-13) the denial of compensation to the Petitioners, and under Point IV (pp. 14-25) the justification of the allowance made to them, and under Point V, they attempt to answer the points argued in Petitioners' Brief. A logical argument was avoided for obvious reasons. We will discuss the points raised in their Brief in the order as they appear in Petitioners' Brief.

I.

The Writ Should Be Granted to Review the Allowance Made to the Respondents.

At the hearing before the Special Master as well as before the District Court and in the Court of Appeals, Respondents took the positive position that the filing of the suit for which they were allowed compensation based on the *ex parte* order of May 1, 1941, *was not the result of the decision* of the Court of Appeals *obtained by these Petitioners* which directed the District Court to appoint examiners to investigate the charges against Ball and to either instruct the Debtor to commence the suit or to permit Petitioners to sue (118 F. (2d) 89), but on the *contrary,* they *persistently* stated that the action was com-

menced because of the subsequent decision concerning the claims of Midamerica (119 F. (2d) 231). They now *admit* and *confess* that it was the first decision that prompted them to begin the action and they say (p. 27), that it was their duty as "supervisors" of the Debtor to commence the action and that *they relied* on the decision in *Gochenour* v. *Cleveland Terminals Building Co.*, 118 F. 289, and *they cite* (p. 28) from the decision the following:

> "A debtor continued in possession under the present act has authority and it is its *imperative duty* with all diligence to collect the assets of the estate." (Emphasis theirs).

and after quoting from that case, they say:

> "Thus, naturally and properly so functioning, they studied the possibilities of affirmative action on the facts and theories developed in the opposition to the Midamerica claims. They would have been remiss in their duties if they had done otherwise."

The foregoing position was not taken by them when the petition to join the Debtor as a party to the Howe suit was presented to the District Court, as clearly appears from their answer, neither did they take that position before the Master when they presented their petition for instructions, nor before the Master on the hearing concerning the fees, but on the contrary they contended throughout the proceeding that the first decision did not influence them and had no bearing whatsoever in connection with their starting the action.

They now attempt (pp. 14 to 25) under Point IV to justify their allowances: (1) because the allowance was "discretionary"; (2) that a Court may consider facts within its "own knowledge"; and (3) that the allowances were not "unreasonable". The first two propositions are not in anywise applicable because the allowances made were

not due to the exercise of discretion; but to the application of the *erroneous legal principle* that appointees of a Court who are *not* appointed on a *contingent* basis are entitled to compensation on a *percentage* basis, regardless of the time devoted, the skill employed, the difficulty of the problem, and the fact that the recovery was the result of a compromise and not of a trial. No discretion was exercised, because the District Court *assumed* that its appointees had developed *all* the facts and *all* the theories. Its conclusion is different from the conclusion of the Court of Appeals that the facts and the theories were supplied and developed by Petitioners and the applicable law was settled in the decisions prior to the commencement of the action. That the District Judge did not and could not have had personal knowledge of the services of its appointees was fully discussed in Petitioners' Brief (pp. 43, 47), and no further reply is necessary.

The third point, that the $65,000.00 allowance was "reasonable", is completely *without merit.* The authorities which they cite apply to attorneys who were employed on a *contingent* basis and who have produced the fund as the result of a *trial and where the attorneys discovered the cause of action.* In the instant case, the Respondents were the appointees of the Court and were *not* employed on a contingent basis. All of the facts and all of the theories and applicable principles of law were settled *before* they commenced the action and they employed a local attorney who was allowed separate compensation.

The only cases which they cite where an attorney for a bankrupt trustee was allowed a $15,000.00 fee is *Page* v. *Rogers,* 149 F. 194. In that case, the fee was upheld because "about one-half" was to be paid by "creditors" and the Court said that unless it "should hold that this

allowance was excessive to the extent of more than one-half, it would not benefit appellants".

The lengthy quotation (p. 21) from the *Osofsky* case is of no comfort to them because this case enumerates *six* elements which are *essential* for the due consideration of compensation to attorneys. These elements are completely lacking here. With the exception of the "conferences", "researches" and the "discussions" with *themselves* which are set forth in their schedule, not a word is to be found in this record concerning these elements which are essential to establish the "reasonableness" of fees.

We pointed out in the Petition that the *essential basic facts* for the allowance *are lacking* in the Master's Report as well as in the Opinion of the District Court. The question whether a Court may sustain a Master's Report which lacks basic findings is a question which deserves a review by this Court.

The illustrations of the cases where funds were recovered by attorneys employed on a *contingent basis* were shown above to be inapplicable. On the other hand, there are many cases where funds were brought in as the result of actual trial and skill employed, and no such liberal allowances were made. The case of *Fisk & Co.*, 209 F. 982, involved a plenary suit where attorneys for a trustee collected $325,000.00 and they asked an allowance of $40,000.00. The Court found that the "questions of fact were complicated", investigation and the preparation of the evidence was warranted, the "questions of law" were "difficult", and the defense was "ably and shrewdly contested", there was a trial and an appeal to the Circuit Court of Appeals and to the Supreme Court of the United States. The Court recognized the "highest

appreciation the value of the services" and it only allowed $32,500.00. In the instant case all the facts were disclosed in the Howe suit and in the Gochenour suit, prior to the appointment of Special Counsel. The factual matters were all established on the objections to the claims of Morgan and Midamerica. The legal questions were solved in the appeal of these appellants in 118 F. (2d) 89 and in the appeal of the Midamerica claims (119 Fed. (2d) 231). *The case was not tried but was settled on the pleadings.* A local attorney was allowed $3,000.00 for his services. There was no finding as to any complications, difficulties or investigations, and yet an allowance was made of $65,000.00!

In the case of *In the Matter of Cheney,* 300 Fed. 465, attorneys were appointed to institute suit in the name of the trustee on a *contingent basis.* They won, and brought into the estate the sum of $800,000.00. The Referee allowed them $62,500.00 for their services. The Judge held that the allowance "was plainly excessive". He said "the extraordinary rewards for brilliantly successful results", which are often willingly paid by individual clients, cannot be expected as allowances for estates in bankruptcy. *He only allowed* $21,500.00.

In re Allied Owners Corporation, 79 F. (2d) 187, affirmed 297 U. S. 464, the attorneys for the trustees representing an estate of $18,000,000.00 who performed services covering 4,500 hours involving many complicated questions of law and fact and litigation, asked for the allowance of $75,000.00 and were only allowed $50,000.00.

In *Mecartney* v. *Guardian Trust Company,* 280 Fed. 64, attorneys brought into the estate as a result of litigation and actual trial, $700,000.00. They were employed on a contingent basis and were allowed $37,500.00.

We can find no case where "appointees" of a court whose fees were *not contingent* were allowed 12% of the fund recovered. The *legal foundation for the allowance was* "clearly erroneous" and the order should be reversed.

II.

The Facts Found By the Master and By the Trial Court Are Not Conclusive Because They Are Based on Inferences Drawn From Undisputed Facts.

The contention under Point I (p. 7) that the facts found by the trial Court are conclusive unless "clearly erroneous" is *inapplicable* for the reason that the findings of the Master and of the Court are *not* based on controversial evidence but *on inferences and deductions* from the undisputed facts and the rule is not applicable to such cases. Besides, the rule is inapplicable to the payment of fees to attorneys. (*Columbian National Life Ins. Co.* v. *Kayes,* 138 F. (2d) 382, 385.)

In *Slavin* v. *Port Service Corp.,* 138 F. (2) 386, the third circuit did not hesitate to reverse a master and judge where there was no foundation for the findings and the rule was no obstacle.

The debtor has attached to his Brief as Appendix the Opinion of the District Court. This was unnecessarily done because the Opinion is printed in the Record (pp. 94-99). This was reprinted because of the desire of the appointees of the court that this Court should give special attention to the Opinion of the District Judge because (p. 2) "it is not long". After reading the Opinion of the District Court, we ask this Court to read the comment on his Opinion in the Petition (pp. 43-47) and the Opinion of the Court of Appeals in 118 F. (2d) 89.

III.

The Answer to Petitioners' Argument Is Confusing and Evasive.

Instead of answering the Petitioners' Argument in the manner as presented, they chose to answer the Petition at the tail end of their Argument (pp. 25-44), and their Argument is confusing and evasive.

The statement (p. 25) that the Circuit Court of Appeals agreed with the findings of the District Court that Petitioners contributed nothing is refuted by the Opinion of the Court of Appeals.

On the one hand they say (p. 28) that Mr. Sharp was appointed Special Counsel for the debtor in connection with the Midamerica claims and he devoted his time to the cause of action against Ball, and, on the other hand, they say that the Order appointing Leckie and Fogg as "supervisors" included an investigation as to causes of action available to the subsidiary debtor. They *concede* (p. 28) that Sharp included in his "fee bill" services rendered prior to May 1, 1941, concerning the recovery of this fund but say that *they*, the "supervisors", also included in their fee bill services for the corresponding period which the Master postponed to a later date when he allowed the compensation to Sharp. Query: If Sharp was specially engaged to perform such service and was paid for such service during that period, *why was it necessary to have Messrs. Leckie and Fogg duplicate the service and why were they entitled to compensation for the same period?* It was at least their duty to testify and explain why this duplication was necessary.

In answer to the point that the position of the debtor was adverse to that of the creditors, they say (p. 31)

"that the debtor has been in possession, technically" as they, "Messrs. Leckie and Fogg" acted as the "supervisors". The appointment of supervisors did not remove the adverse interest of the corporate officers and while Leckie and Fogg acted as supervisors of the Cleveland Terminal Buliding Co., they acted, at the same time, as Trustees for the Parent, the Van Sweringen Corp., and *such interests were adverse.*

The contention (p. 33) that the Respondents did not avail themselves of the facts and theories developed by the Petitioners and set forth in the Gochenour and Howe suits because these two actions were "grounded" on the theory of "actual fraud", being the same theory "that the same counsel asserted in their unsuccessful effort" to defeat the claim of Morgan, is *false* for the reason that while Petitioners were unsuccessful to defeat the *entire* claim, they *did defeat the claim to the extent of* $5,000,000.00 (117 F. (2d) 259) which neither the debtor, nor the subsidiary debtor nor the appointees of the Court contested. That the theory in these two suits was the basis for the theory of the suit later commenced by the Respondents was fully discussed in the petition (pp. 36-38) and no further reply is necessary.

The justification for the admission in evidence of the newspaper clippings on the ground that they were not offered as evidence of the truth of the statements contained therein, but for the purpose of showing that Petitioners did not furnish this knowledge, is without any reference to the record to show that these documents were offered for any particular purpose. A reference to the Master's Report and the Opinion of the Judge will refute the contention.

In answer to the point that if these newspaper clippings were available to the Master and to the Court as to apprise them of the existence of the cause of action they would have taken action to prevent the distribution of the funds to the Ohio residents by Midamerica, Respondents say (p. 34) that distribution was made in the Spring of 1937. *This case was pending in Court since October* 13, 1936. If the Master and the Court had knowledge from the newspaper clippings in 1936 of the existence of the cause of action, *they would not have permitted the distribution of the funds in the Spring of* 1937 *to the Indiana residents.* This conclusively demonstrates the impropriety of the admission of this exhibit into evidence as a foundation for the Master's findings and of the Court's approval of his findings. In one breath they claim that the distribution by Midamerica was made in the Spring of 1937 and that they were appointed in 1938, and in another breath they urge (p. 40) that they were appointed as Trustees of the Van Sweringen Corporation on February 9, 1937. If their position was not adverse, and if they *knew* of the existence of the cause of action from the newspaper clippings, *they would have taken action in the Spring of* 1937 *to prevent the distribution.* Because of the distribution of the funds to non-residents, it was necessary to commence a suit in a *foreign* jurisdiction, and the matter was compromised for $550,000. Perhaps if the distribution was prevented, $5,000,000 *would have been recovered,* as was the case in a suit commenced by another creditor, which case is now pending on Certiorari before this Court (*Ball* v. *Cook,* No. 426).

For the foregoing reasons we submit that the writ should be allowed.

Respectfully submitted,

MEYER ABRAMS,
HARRY J. MYERSON,
Attorneys for Petitioners.